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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,

Petitioner,

—v.—

CITY OF NICEVILLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

QUESTIONS PRESENTED

1. Whether any First Amendment issue is raised when political officials create a government cable television system and use a city's sovereign powers—including the powers of taxation, subsidization and regulation—to drive all private cable speakers from the marketplace?

2. Whether it is consistent with the First Amendment for a government cable system to compete with a private cable speaker, even on fair terms, in a market which can support only one cable system and where the government will become the only cable speaker heard by a city's citizens?

3. Whether, under this Court's decision in *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986), a private cable system about to be driven from the market by a government cable system is entitled to a trial on the First Amendment issues framed by the pleadings and summary judgment motion: (1) Will the government employ predatory tactics that will drive all private cable speakers from the market; (2) Can the market sustain more than one cable system; (3) Is the government motivated to exclude the private cable system because of objections to its exercise of editorial discretion and the content of its programs; (4) Can the government demonstrate a strong or compelling state interest in supplanting the only private cable speaker with a government controlled cable speaker; and (5) Are the means the government has chosen to achieve its goals narrowly tailored and the least restrictive means available?

PARTIES TO THE PROCEEDING

Petitioner, the plaintiff in the district court and appellant in the court of appeals, is Warner Cable Communications Inc.* Respondent, the defendant in the district court and appellee in the court of appeals, is the City of Niceville, Florida.

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* Warner Cable Communications Inc. is wholly owned by Warner Communications Inc., a wholly-owned subsidiary of Time Warner Inc. The subsidiaries of Warner Cable Communications Inc., excluding wholly-owned subsidiaries, include Palm Springs Communications Corporation, Warner Cable Communications of Cincinnati, Inc., Gulf Coast Cable Television, Warner Cable Communications of Greater Akron, Warner Cable Communications Company of Queens, Warner Cable Communications Company of Brooklyn and Warner Cable Communications Company of Greater Cincinnati.

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CITY OF NICEVILLE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Warner Cable Communications Inc. ("Warner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 911 F.2d 634. The two opinions of the district court in this case (App. 20a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1990 (App. 1a). A petition for rehearing was denied on November 16, 1990 (App. 54a-55a). On January 25, 1991, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including March 15, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

Warner has provided cable television services in Niceville and surrounding areas in Okaloosa County, Florida, for approximately two decades. It offers 44 channels of programs. More than 80% of the homes in Niceville subscribe to Warner's system.

In 1985, the Niceville City Council passed an ordinance authorizing the municipal government to construct and operate its own cable television system. Local political officials objected to certain of Warner's policies as to religious programs. They promised that the City's system would charge lower prices to subscribers than Warner charges. The City system can charge lower prices only if it operates below cost. Niceville's cable expert stated that the City's system would require "cross-subsidies" from "other [municipal] resources" (App. 90a) and council members predicted a "shortfall" (App. 76a-78a; *see also* 90a). Similarly, Niceville representatives testified the City was not concerned with making a profit (App. 78a, 87a). Niceville's consultants predict that this below-cost pricing will result in the government's subsi-

dized system capturing 75% of Warner's subscribers in the first year alone (App. 75a).

Warner alleged that Niceville would use an arsenal of discriminatory advantages, including the subsidization of the City system from the government's general funds, in order to destroy Warner as a cable speaker in the community, leaving the City as the only speaker. The Chairman of Niceville's Cable Committee stated that the City would employ its regulatory powers to disadvantage Warner and "there is not gonna be a competitive system in Niceville" (App. 75a, 79a).

Warner further alleged that the Niceville market could support only one cable television system and that the City would be the sole cable speaker. Niceville denied these allegations. The court of appeals denied Warner the right to a trial of these issues.

Warner's Cable Operations in Niceville

Warner exercises broad editorial discretion in selecting and originating programs in Niceville. It communicates with the public on a wide variety of topics including news, information, public affairs, and religious and entertainment programming. Warner originates programs in its own studio, affords access to third-party speakers, and selects television stations and specialized cable program services, such as CNN and C-Span which feature twenty-four hours of news and public affairs. Warner, exercising its editorial discretion, makes selections from more than 70 satellite program services.[1]

Warner's locally originated programs include debates and discussions of issues of community interest, reports of election and primary returns, important council meetings in the area, various public events (such as recent local demonstra-

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1 *See* Report of the Federal Communications Commission ("FCC") *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services*, 67 Rad. Reg. 2d (P&F) 1771, Appendix G at 1843 (1990) ("FCC 1990 Report").

tions and speeches concerning the Gulf War), educational events, local business and commercial news, religious services, sports activities, fund-raising functions, and information as to other events of local interest.[2]

Warner operates under a non-exclusive cable franchise granted by the City of Niceville.[3] The City imposes an annual franchise fee of five percent of Warner's gross revenues from subscribers. In addition, under the franchise, the local political officials possess sweeping regulatory powers over virtually every aspect of Warner's cable system—powers which they exercise in their unfettered discretion.

The franchise (App. 56a-71a) gives the City Council the authority to regulate Warner's rates and services to subscribers.[4] The local political officials put pressure on Warner concerning editorial and programming decisions.[5] They exercise close regulatory surveillance over Warner's television distribution system, maintenance, repairs and customer services. They have the unlimited discretion to compel Warner to extend, at its own expense, the cable distribution system to subscribers in "remote" and "inaccessible" areas. The City has the right to inspect Warner's books and records and has access to confidential business information about Warner's

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2 Cable systems across the nation are increasing local origination of information and news services. *See N.Y. Times*, April 14, 1990, at 33; *Electronic Media*, Nov. 5, 1990, at 1; *Cable tv Business*, Sept. 15, 1990, at 27; *Newsday*, Feb. 23, 1988 (Nassau and Suffolk Ed.) Pt. II, at 3. The National Telecommunications and Information Administration of the Commerce Department recently stated: "Cable has shifted from its early role as a broadcast antenna service focused on facilities, to an original programming service . . . ." *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* (June 1988) at i ("NTIA Report"). Warner will prove at trial that, like other cable systems across the nation, it is increasing local news, public affairs and other informational programs in Niceville.

3 Warner originally operated under a non-exclusive franchise granted by Niceville in 1971. In 1980, Niceville granted Warner a second non-exclusive franchise that extends until 1995.

4 See n.7, *infra*.

5 See p. 5, *infra*.

operations. Finally, the City has the ultimate power over Warner—to deny a renewal of its franchise to operate the business of disseminating news, information and entertainment via cable television.

Niceville's Plan to Compete with Warner

In 1984, Niceville awarded a cable franchise to Cosmic Communications, Inc. ("Cosmic"), a company controlled by local residents. Since both privately-owned systems would be competing on even terms, Warner did not oppose the grant of a franchise to Cosmic.

In 1985, however, the Niceville City Council passed an ordinance authorizing the municipal government to construct and operate its own cable system. The local political officials expressed various motives for launching a municipal system including, among other things, objections to Warner's editorial judgment and policies as to religious programming (specifically, Warner's decision to drop the Praise the Lord's Inspirational Network featuring Jim and Tammy Bakker) and to the notion that New York City executives were making programming decisions for residents of the Florida panhandle (App. 76a, 80a-81a, 87a).

Upon learning of the City's plan to construct its own system, Cosmic surrendered its franchise, recognizing its inability to compete against a government-subsidized system. Niceville then selected Cosmic to act as the City's cable consultants. The City, assisted by Cosmic, promptly entered into nineteen affiliation agreements, each for a three-year term, with various program suppliers, thereby filling most of the municipal cable system's schedule (App. 82a-86a). One of the first program services signed up by Niceville was the Jim and Tammy Bakker network that Warner had dropped despite the strong protests of the local political officials (App. 83a-87a).[6]

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6 In 1986, after Niceville had selected nineteen program services under three-year affiliation agreements—constituting the bulk of the schedule for the municipal cable system—the local political officials went through the motions of appointing members of a board purportedly

The City, as Warner demonstrated below on the summary judgment motion, enjoys major competitive advantages over Warner which derive from its taxing, regulatory and other power. The City intends to use those advantages to oust Warner from the market.

Niceville will resort to general municipal funds to subsidize the City's below-cost pricing strategy. The City's own expert testified it would have to cross-subsidize operating deficits from general tax revenues (App. 90a-91a; *see also* App. 76a-78a, 92a-93a). Council members acknowledged that the Niceville system, like a nearby municipal system, would experience "shortfalls" that would have to be subsidized (App. 76a-78a; *see also* App. 90a, 92a-93a). In addition, the City will resort to tax revenues to meet its obligations under the $2,000,000 bond issue floated to construct its cable system (App. 72a-74a, 88a-89a).

The City will impose a tax or franchise fee of five percent of Warner's gross revenues; the City will bear no similar economic burden. The City's system will enjoy tax immunity; Warner, by contrast, pays property, sales and income taxes. The City has access to especially favorable financing, not available to a privately-owned company, by pledging its tax revenues (App. 78a, 88a). The City intends to use its regular municipal facilities to promote and favor its cable system (App. 90a). Niceville enjoys other major advantages over Warner, including the authority to regulate Warner's rates, which gives it a "big hammer" according to Councilman Brown who heads the City's Cable Committee.[7] The City

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responsible for choosing programs for the City's system. The Mayor selected two members; each council member selected one. These political appointees each serve terms of three years (the length of the program affiliation agreements already entered by the City).

7 Councilman Brown stated: "The big hammer on the franchise was originally the rate control; if you're controlling somebody's money, you are controlling them" (App. 80a). The district court concluded that there was an issue of fact as to whether Niceville still had the legal power to exercise rate regulation under the franchise because of FCC

exercises pervasive regulatory powers over virtually every aspect of Warner's cable operations. Finally, the City has the ultimate power over Warner—the power to refuse to renew its franchise.

The record below shows that the City intends to use its taxing and other powers to drive Warner out of business (App. 93a). The City can price its competing services artificially below cost because it has access to tax revenues to cover operating deficits and to repay the construction cost of its cable system. The City will use its deficit-pricing strategy to capture 75% or more of Warner's customer (App. 75a). The Chairman of Niceville's Cable Committee admitted that if faced with the need to raise taxes or an opportunity to disadvantage Warner by regulatory powers, "I would have to fight for the [City's] system" (App. 79a). He added "there is not gonna be a competitive system in Niceville" (App. 75a).

Warner's Lawsuit Against Niceville

In November 1985, Warner filed a complaint against Niceville alleging, among other things, violations of its rights under the First and Fourteenth Amendments. Warner asserted that the City planned to "chill and eventually completely deprive [Warner's] freedom of expression and communication of ideas, expression and entertainment" by making its operations economically infeasible (Complaint

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regulations issued pursuant to the Cable Communications Policy Act of 1984 (47 U.S.C. §§ 521-559 (Supp. V 1987)) ("the Cable Act"). Under those regulations, cable rates cannot be regulated if a cable system is subject to "effective competition," which the FCC defined to mean competition from three television stations that provide Grade B signals or that are significantly viewed in the community (App. 24a). Warner contended it was still subject to rate regulation; the City denied it still had the power to regulate rates. In any event, a proposal is now pending before the FCC that would indisputably give Niceville the power to regulate Warner's rates. *Further Notice of Proposed Rulemaking*, MM Docket No. 90-4, 56 Fed. Reg. 406 (January 4, 1991).

¶ 19). Warner further alleged that the City intended to become the "sole provider of cable television services to the citizens of Niceville" (*Id.* ¶ 25). Warner also alleged violations of its due process rights because the City would pervasively regulate Warner while simultaneously competing against it (*Id.* ¶ 34).

The City moved for summary judgment. The district court concluded that the First Amendment claim raised issues of fact, including whether the City would definitely drive Warner out of business and whether the Niceville market could economically support more than one cable system (App. 41a). The district court stated that "there are a variety of factors that will influence the outcome of this competition [between the City and Warner] that cannot be determined at this point" (App. 41a). Instead of ordering a trial on these disputed factual issues, the district court avoided the constitutional question by ruling that the First Amendment claim was not "ripe" because Warner's right to speak had not yet been "totally suppress[ed]" (App. 41a).

The district court denied the summary judgment motion on the due process claim and, in a subsequent bench trial, dismissed the claim on the ground that Warner had not yet suffered impairment of its rights (App. 20a, 47a).

Warner appealed from the district court's decisions. Warner's argument on the First Amendment claim in the court of appeals—and the City's response—focused almost exclusively on whether this issue was "ripe," not on the merits of the free speech issue. The court of appeals, disagreeing with the district court, correctly concluded that the First Amendment issue was ripe (App. 5a).[8] But the court then proceeded, *sua sponte*, to address the merits of the First Amendment claim,

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8 The law clearly supports this conclusion. *See, e.g., Michigan State Chamber of Commerce* v. *Austin*, 788 F.2d 1178, 1182-1185 (6th Cir. 1986) ("When a reasonable likelihood is established that events which will trigger the prohibited acts will occur, resulting in enforcement of a statute in a way that arguably in infringes a plaintiff's First Amend-

even though the matter had not been fully briefed or argued on appeal and even though the district court had found material factual issues relevant to a First Amendment analysis.

In a sweeping pronouncement, the court of appeals declared:

> We conclude that Warner fails to assert a protected First Amendment interest *even if* the projected City-owned system will *surely* render Warner's continued operation in Niceville economically infeasible.

(App. 5a) (emphasis added). In laying down that broad rule, the court of appeals reasoned that "economic loss" (no matter how unfair or devastating) caused by competition with an advantaged government speaker cannot, as a matter of law, give rise to a cognizable First Amendment claim. Destruction of the only private cable speaker in the marketplace and discouraging a potential private entrant by subsidized government competition was *per se* constitutional in the view of the court of appeals.

At a later point in its opinion, the court of appeals theorized that "the government may not speak so loudly as to make it impossible for other speakers to be heard" by, for example, using a soapbox with "powerful loudspeakers" (App. 8a). The court, however, concluded that this principle was not germane here because the sort of drowning out at issue is an economic one, achieved through unfair competition, rather than a physical one, achieved through loudspeakers or megaphones. The court thus limited First Amendment protection to physical drowning out and found it unnecessary to address the undisputed evidence that the City

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ment rights, a concrete dispute has been presented"); *Morial* v. *Judiciary Comm'n.*, 565 F.2d 295, 298 (5th Cir.) (*en banc*) ("Pre-conduct challenges to the validity of laws burdening first amendment rights are among the essential bulwarks of a system of free expression"), *cert. denied*, 435 U.S. 1013 (1977); 13A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3532.3 at 159 (2d ed. 1984) ("First Amendment rights are particularly apt to be found ripe for immediate protection").

enjoys major competitive advantages over Warner, which will result in its cable speech being drowned out.

Concluding that there was no burden on Warner's First Amendment rights, the court of appeals stated "we need apply no balancing test to the City's action" (App. 11a). In other words, the appellate court concluded it need not decide whether the local political officials had established a strong or compelling state interest for their action and adopted narrowly tailored means to achieve that interest.

The court of appeals also opined, without support, that the local political officials did not "target the content of Warner's speech" (App. 5a n.4). The record, however, contains undisputed evidence that the local political officials were hostile to Warner's editorial judgments and policies as to religious programming and to the notion that New York City executives made programming decisions for Niceville's residents.[9]

Warner's petition for rehearing asked that the case be remanded for trial so it would have its day in court—an opportunity to obtain a favorable resolution of the disputed factual issues that the district court concluded were relevant to a First Amendment analysis.[10] Alternatively, Warner requested rehearing so it could fully brief and argue the merits of the First Amendment claim because the briefs and argument on appeal focused on ripeness, not the merits of the free speech question. The court of appeals denied rehearing.

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9 The court of appeals also ruled that dismissal of Warner's due process claim was warranted because it was not ripe at this time (App. 12a). Warner does not now seek separate review of the due process issue except to the extent that due process considerations are intertwined with the First Amendment concerns raised in this petition.

10 The district court, as noted, did not order a trial on these factual issues because of its erroneous conclusion that the First Amendment claim was not ripe.

REASONS FOR GRANTING THE PETITION

This case merits plenary review because the court of appeals, contrary to numerous decisions of this Court including *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986), laid down drastic and erroneous principles of First Amendment law that permit government suppression of cable television speakers.

There are three reasons for granting the petition.

First, the court of appeals denied Warner a trial on the radical proposition that "Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible" (App. 5a). The conclusion that when government intentionally silences a speaker by regulation and unfair economic competition, there is never a claim under the First Amendment is supported by no case law, contradicted by numerous decisions, and cannot withstand analysis.

Second, a trial is required to frame the issue whether, in a market that can support only one cable system, government, even without unfair advantages, may compete with a private speaker if the result will be that government becomes the sole speaker. Warner alleged that the Niceville market could sustain only one cable system, the City denied it, and the trial court concluded that there was a contested factual issue. Nevertheless, the court of appeals, without a record, simply assumed that Niceville could support more than one cable system. A crucial legal issue was thus improperly evaded.

Third, having ruled that destructive government competition could never violate the First Amendment, the court of appeals concluded that it need not engage in a balancing test to determine whether the City's action was justified by a strong or compelling state interest and whether Niceville had adopted narrowly tailored means to achieve that interest. That is clear error.

Denying Warner a trial on that issue, among others, is in direct opposition to this Court's decision in *Preferred*. That decision held that a cable speaker has First Amendment rights, that a City might have interests which would justify excluding the cable speaker from the marketplace, and, hence, that a trial of the facts was required. The Eleventh Circuit flatly refused to consider whether the City had a justification for its action or had adopted narrowly tailored means.

The court also denied Warner a trial on other critical First Amendment issues—whether the City would drown out its speech by unfair competitive leverage; whether Niceville was a market that could support only one cable system; and whether the City's action was motivated, at least in part, to punish Warner for the content of its speech. The court of appeals avoided these factual issues by laying down a drastic and incorrect rule of law and by making factual assumptions not supported by the record. *Preferred* is not satisfied by substituting appellate fact-finding for a trial.

The judgment of the court below is in flat conflict with numerous decisions of this Court and basic First Amendment principles. That judgment is certain to encourage the growing trend of city governments establishing their own cable systems, driving private cable speakers out of the market, and ensuring that only government speech will be heard on this important medium. Other municipalities will follow Niceville's example, if the opinion below is allowed to stand. The threat of supplanting private speech by government-owned cable systems is, in fact, increasing dramatically.[11]

This creates the danger that local political officials will become the gatekeepers for the dissemination of video news,

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11 In 1989, there were reportedly 10 communities with privately-owned cable systems where local governments were considering building rival, city-owned cable systems. Kagan, *Cable TV Franchising*, July 31, 1989, at 6. By last fall, there were reportedly 36 such cases. Kagan, *Cable TV Franchising*, October 31, 1990, at Supp. 2-6. Today, there are reportedly 84 such cases according to recent Kagan research.

information, and religious and entertainment programs. This poses particularly grave First Amendment problems in communities such as Niceville which do not have local television stations and rely so heavily on local cable systems. It is crucial to the public's First Amendment rights, as well as to the free speech rights of cable television, that this Court review the judgment below, establish guidelines for lower courts, and remand for trial.

I.

WARNER DID NOT LOSE ITS FIRST AMENDMENT RIGHT TO SPEAK BECAUSE NICEVILLE ELECTED TO SILENCE IT BY PREDATORY ECONOMIC COMPETITION RATHER THAN BY AN OUTRIGHT BAN ON ITS ABILITY TO SPEAK.

This Court's decision in *Preferred* establishes that a government's exclusion of a cable speaker from the marketplace "implicate[s] First Amendment interests" because "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable operators] seek to communicate messages on a wide variety of topics and in a wide variety of formats." 476 U.S. at 494. The Court said: "Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *Id.* at 494.[12] The

12 The courts of appeals for the various circuits have, in the past decade, uniformly treated cable program distributors as First Amendment speakers because they originate, select and disseminate news, information and entertainment. *See, e.g., HBO* v. *FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434, 1444-5, (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025, 1052-57 (8th Cir.), *cert. granted*, 439 U.S. 816 (1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Omega Satellite Products* v. *City of Indianapolis*, 694 F.2d 119, 127-29 (7th Cir. 1982); *Community Communications* v. *City of Boulder*, 660 F.2d 1370, 1378-80 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

court of appeals here held, however, that "Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible" (App. 5a).

The court acknowledged that it was making new law: "After *Preferred*, the full contours of a cable operator's first amendment right remain unshaped. Whatever those contours may be, however, we conclude that the right to be free of competition is not within them, even when the cable operator's most formidable competitor is a municipality" (App. 6a). This peculiar reasoning rested upon the means by which the City chose to silence Warner: "Such economic loss, however, does not constitute a *first amendment injury*" (App. 7a) (emphasis the court's).

The court adopted as dispositive a distinction that is without significance in First Amendment jurisprudence, *i.e.*, since Warner was not formally forbidden to speak, it did not matter that economic loss intentionally inflicted by a government-subsidized system would make it impossible for Warner to speak. That is "shaping the contours" of the First Amendment right recognized in *Preferred* with a vengeance. It defies prior rulings of this Court, holding that unconstitutional restraints need not constitute direct prohibitions of speech but may result from more "subtle" and less "familiar or traditional" means.[13]

The sweep of the new First Amendment rule created by the court of appeals is shown by the fact that Warner had intro-

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13 *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960) (First Amendment rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference"); *Miami Herald Publishing* v. *Tornillo*, 418 U.S. 241, 256 (1974) ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitation on governmental powers"); *CBS* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 168 n.18 (1973) (Douglas, J., concurring) (The Court has repeatedly struck down various forms of "indirect restrictions" that "discouraged or chilled constitutionally protected rights of speech").

duced substantial evidence in the district court that Niceville intends to give its cable system advantages, such as access to tax subsidies and freedom from the heavy franchise fees that Warner must pay, with the clear intention and inevitable effect of driving Warner from the market so that the government's cable system will be the only cable speaker in the community.

Contrary to the panel's holding, this Court has consistently held that government can be guilty of inflicting First Amendment injury by imposing economic loss. *See, e.g.*, *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964) (economic burdens from excessive defamation judgments chill "uninhibited, robust, and wide-open" debate); *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 794 (1988) (economic limitations on fundraising expenditures "may well drive professional fundraisers out of North Carolina" and the resulting "restriction is undoubtedly one on speech and cannot be countenanced"); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (economic limitations on election expenditures invalidated); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (economic penalty for speech invalidated); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (tax on ink and paper for large newspapers invalidated); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) (discriminatory tax on general circulation magazines invalidated); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) (discriminatory tax on press invalidated).

The court below gave no reason, and none appears, why economic loss inflicted by government through predatory competition and sovereign advantages is not a First Amendment injury though it is acknowledged that economic loss inflicted by discriminatory taxation is such an injury. Indeed, here, the distinction between competition and taxation does not even exist because Niceville will impose discriminatory taxes. Warner is required to pay Niceville a franchise fee of five percent of its gross revenues while Niceville will bear no

similar burden.[14] This case is thus indistinguishable from *Arkansas Writers' Project*, *Minneapolis Star*, and *Grosjean*. It is also indistinguishable in principle from *Sullivan*, *Riley*, *Buckley* and *Speiser*.

The Eleventh Circuit's position is so extreme that the City of Niceville did not even argue it. It is easy to see why. The court's rule would allow any number of results utterly inconsistent with the First Amendment. Suppose a private individual owns the only television station in a municipality but the city government elects to build a second which it subsidizes with tax monies so that it can charge below-cost advertising rates. The result is to drive the only privately-owned station from the market. The panel's rule finds no problem in that. The court's principle would, in fact, hold that there is no First Amendment problem if the federal government bought a national cable system, subsidized it from the Treasury, and achieved a complete monopoly of cable throughout the United States.

The First Amendment cannot countenance such results and, for that reason, cannot countenance the court of appeals' new rule.

II.

A GOVERNMENT SPEAKER MAY NOT COMPETE WITH A PRIVATE SPEAKER IN A MARKETPLACE WHERE ONLY ONE CAN SURVIVE.

Warner has argued to this point that Niceville may not employ the weapons of sovereignty to ensure that no private speakers can survive in competition with the City's cable system. Warner submits, however, that a more stringent First Amendment rule is necessary: where a market will economically support only one cable system, government may not

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14 Warner also pays sales and property taxes to the City and income taxes to the State while Niceville is immune from all such taxes.

compete even on non-discriminatory terms to become the sole surviving cable speaker.

If this is a correct interpretation of the First Amendment, and we think the proposition self-evident, the issue of Niceville's ability to support more than one speaker is pivotal and trial is required on that issue. Despite the fact that the parties disagreed on this question, and the district court found a genuine issue of material fact (App. 42a), the court of appeals assumed that Warner's contention was factually wrong and the City's was correct.[15]

The court of appeals assumed that Niceville could support more than one system in attempting to distinguish this case from *Preferred*. In *Preferred*, the panel said, the City of Los Angeles was attempting to limit the market to one cable system and the relief sought by the petitioner would have increased speech in the marketplace. By contrast, the court of appeals said that the City of Niceville is trying to add a second speaker, itself, and Warner asks the courts to exclude Niceville, thereby decreasing speech (App. 11a-12a). This is to decide that two speakers can survive, as the City contends, thus ruling against Warner on the disputed factual question it has not been allowed to try.

Once more, this Court's decision in *Preferred* requires that the judgment of the Eleventh Circuit be reversed and the case remanded for trial. If, as Warner alleged, only one cable system can survive in Niceville, and should the survivor be the City's system, there will be no privately-owned video programmer in Niceville to comment on community issues or the

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15 Courts have found that certain communities can economically support only a single cable system. *See, e.g., Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (Posner, J.); *Community Communications* v. *City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Central Telecommunications, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987). Other authorities have questioned the validity of that economic theory. *See, e.g., NTIA Report* at 18-19; *FCC 1990 Report* at ¶ 99. Warner was entitled to a trial of this issue as it pertains to the particular circumstances of the market in Niceville.

local political process—core First Amendment functions. Since Niceville has no local over-the-air television station,[16] a local cable system offers the only potential means to provide video programs that cover local news and information.

The First Amendment requires, and the vitality of our democratic system depends on, a robust private press, not a government monopoly speaker. *See, e.g., Mills* v. *Alabama*, 384 U.S. 214, 219 (1966) ("the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve"); *FCC* v. *League of Women Voters of California*, 468 U.S. 364, 415 (1984) (Stevens, J., dissenting) ("In my judgment the interest in keeping the Federal Government out of the propaganda arena is of overriding importance. That interest is of special importance in the field of electronic communications, not only because that medium is so powerful and persuasive, but also it is the one form of communications that is licensed by the Federal Government").

III.

WARNER RAISED ISSUES OF MATERIAL FACT THAT, UNDER THE FIRST AMENDMENT AND THIS COURT'S DECISION IN *PREFERRED*, REQUIRE A TRIAL TO DEVELOP A RECORD.

At the heart of Warner's case are allegations of fact that the district court did not resolve and the court of appeals found unnecessary to resolve in order to reject Warner's First Amendment claim. In particular, Warner alleged—and offered substantial proof—that (1) Niceville's cable system

16 The nearest VHF television stations are located 45 to 100 miles away, in Mobile, Pensacola and Panama City. They do not provide coverage of local issues in Niceville. There is a UHF television station, Channel 35, in Fort Walton Beach, a nearby community. However, that station provides no news coverage, local or otherwise, and merely plans to retransmit the signals of a Pensacola station, 45 miles away.

would have unfair competitive advantages over Warner's systems and thereby make competition impossible; (2) Niceville is a market which can economically support only one cable television system; and (3) Niceville's decision to launch a cable television system was motivated, at least in part, by objections to Warner's editorial judgments and program content. Just as the First Amendment claim in *Preferred* required resolution of factual issues, so here the court of appeals could not properly dismiss Warner's First Amendment claim without a trial of these central factual issues.

The court of appeals also defied *Preferred* by flatly refusing to engage in a "balancing" test—to consider whether Niceville had established well-founded governmental interest to support its action and also demonstrated that it had adopted narrowly-tailored means to achieve such an alleged state interest. We consider, in turn, each of these issues requiring a trial under the First Amendment.

(1) Having concluded that Warner had no First Amendment interest in not being driven from the marketplace by government competition, the Eleventh Circuit panel underscored its ruling—that competitive injury is never cognizable under the First Amendment, no matter how unfair or destructive—by contrasting *physical* restraints on speech with *economic* inhibition of speech. The court agreed that "the government may not speak so loudly as to make it impossible for other speakers to be heard" by, for example, building a "better soapbox equipped with spotlights and powerful loudspeakers" (App. 8a). The court said this principle was inapplicable here because the drowning out would occur through competitive rather than physical means. That distinction is baseless. Here, Warner has profferred substantial evidence that Niceville will drown it out by its taxing, regulatory and other powers, just as surely as if the City drowned it out by blaring loudspeakers.

The economic factors leading to the City's drowning out Warner's free speech are not disputed. Niceville, as noted, charges Warner five percent of its gross revenues while

exempting its own cable system from a similar economic burden. Niceville imposes sales and property taxes on Warner but its own cable system will be tax-exempt. Niceville will subsidize its deficit operations and repay its construction bonds with general tax revenues.

Niceville will also operate its system without the regulatory burdens and heavy costs it imposes on Warner. The City's franchise gives Niceville the power to regulate virtually every aspect of Warner's activities. The City wields what it calls the "big hammer" of rate control.[17] The City seeks to restrict Warner's exercise of editorial discretion. The City requires Warner to extend service to "remote" and "inaccessible" areas and prevents Warner from recovering its costs for such extensions. The City has the right to review annually Warner's confidential financial, marketing, and technical information. The City has the power to refuse to renew Warner's franchise.

To top it all off, Niceville has authorized the issuance of revenue bonds in the sum of $2,000,000 to construct the City's cable system. The bonds, backed by sales taxes and entitlement funds from the State of Florida, will be sold to Niceville residents. Those bondholders will have a powerful economic incentive to prefer the City's system in which they have a financial stake. Indeed, all Niceville residents—whether or not bondholders—will have a strong motive to prefer the City's system over Warner's system in an effort to forestall the City from raising higher taxes to operate its deficit system. The members of the City Council will also have a powerful political incentive to make sure that the City's cable operation is the survivor in the unfair competitive contest with Warner.

The Chairman of the City Council's Cable Committee, as noted, testified that he would impose regulatory restraints on Warner if necessary to uphold the City's promise to operate its own system with lower subscriber rates than Warner's: "I

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17 See note 7 *supra*.

would have to fight for the [City's] system, if that's what you're asking" (App. 79a). He confidentially assured the other City Council members "there is not gonna be a competitive system in Niceville" (App. 75a).

Niceville's promise of low prices can be kept only by the tax subsidies and other discriminatory benefits it will confer on its own cable system and by the discriminatory economic burdens it will place upon Warner. Warner will have to compete against a government soapbox operated on a subsidized, below-cost pricing strategy. If Niceville can suppress private cable speech by government leverage, then any other community in the United States can similarly supplant free speech.

The facts about the impact of the City's unequal, subsidized "soapbox" must be tried because the law is clear that public officials may not eliminate private speakers by wielding the weapons conferred by sovereignty. *See, e.g.*, L. Tribe, *American Constitutional Law* 807 (2d ed. 1988) (the government may add its voice to private voices "provided it does not drown out private communication"); T. Emerson, *The System of Freedom of Expression* 712-713 (1970) ("very easy to visualize situations in which the government's voice may overwhelm or displace all others and thus seriously distort the system of free expression"); S. Shiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 607 (1980) ("If a system of free expression is to be preserved, either custom, or statutes, or constitutionally based limitations must provide assurances that government speech will not unfairly dominate the intellectual marketplace"); M. Yudof, *When Government Speaks* xv (1983) ("If government dominates the flow of ideas and information, the ideal of the self-controlled citizen, making informed choices about his government, is destroyed").

This Court has long recognized these basic First Amendment principles. *See, e.g., Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 387 (1969) (no right to "snuff out the free speech of others" or monopolize the electronic media); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.17 (1978) (corporate advocacy, if it drowned out private speech,

"would merit our consideration"). *See also NAACP* v. *Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("government may not monopolize the marketplace of ideas"). *Compare United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) (prohibiting AT&T from entering electronic publishing because of dangers of destroying competition by charging higher tariffs to competitors than to its own operations). AT&T's competitive leverage parallels Niceville's leverage—leverage which poses a threat to the survival of private cable speakers in the City.

The court of appeals should have ordered a trial on the issue of the devastating impact of the City's superior "soapbox" built on tax subsidies, discriminatory tax burdens and sweeping regulatory powers. The City has unfair leverage and the intent to drown out two private cable speakers—Warner and Cosmic, the potential new entrant.

(2) The court of appeals rejected Warner's untried allegation, which the City denied, that Niceville can sustain only one cable system, even though the district court held this raised a material issue of fact (App. 42a). This issue, as shown above (*see* pp. 16-17), is central to a principled analysis of the First Amendment question.

(3) Warner is also entitled to a trial to determine whether the local political officials decided to displace Warner because of objections to its exercise of editorial discretion and program content. In particular, Council members strongly objected to Warner's decisions as to religious programming (specifically, its decision to drop the Jim and Tammy Bakker Inspirational Network) (App. 76a, 80a-81a, 87a). Indeed, when Niceville decided to build its own cable system, one of the first program services it signed up was the Jim and Tammy Bakker religious network (App. 83a-87a). The local political officials also objected to the notion that

New York City executives were making programming decisions for Niceville residents (App. 81a).[18]

Despite this evidence of censorial intent, the court of appeals incorrectly found, without explanation or record support, that "Warner implicitly recognizes that Ordinance 581 [authorizing the municipal system] does not target the content of Warner's speech" (App. 5a). Instead of making conclusions contrary to the record, the court of appeals should have remanded for a trial as to whether the City's action was motivated, in whole or part, by objections to Warner's exercise of editorial discretion and program content. Conduct aimed at content, of course, would raise the most troubling First Amendment concerns. *See FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 707 (1979) ("Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include").[19] This issue surely demands strict judicial scrutiny, not cavalier assumptions by the court of appeals which are contrary to the record.

(4) *Preferred* also requires a trial to test the government's purported justifications for what it proposes to do in Niceville as well as Warner's claim that the City had less restrictive methods available to achieve its purported goals—methods less destructive of free speech. *Preferred* specifically remanded for trial on those very issues. Here, Niceville contends that it needs a City-owned cable system to offer better programming than Warner's system and to offer special two-way interactive services (*e.g.*, burglar alarms, traffic light

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18 In fact, many programming decisions are made by Warner's local management in Niceville according to its judgment of the viewers' needs and interests.

19 *See also Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *Consolidated Edison of New York, Inc.* v. *Public Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) ("Governmental action that regulates speech on the basis of its subject matter slip[s] . . . into a concern about content' ") (quoting *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972)).

controls, water-well metering, etc.). These are not interests that justify making the government the monopoly cable speaker in town.

The City contended below that, under *United States* v. *O'Brien*, 391 U.S. 367 (1968), it had merely to show that the interests served were important. (The City, unlike the court of appeals, at least recognized that First Amendment rights were at stake.) Warner submits that the City must meet standards much more stringent than those of *O'Brien*.

This is not a case like *O'Brien* where generally applicable legislation happens to impair indirectly some speech or press freedom. This is a case of government action directed specifically at a private speaker and a potential private entrant and designed to silence that speaker and entrant forever. Moreover, Warner will prove at trial that Niceville was motivated, at least in part, by a desire to affect its editorial judgments and program content.

But there is an additional reason why Niceville's action must be subject to the strictest judicial scrutiny. This case does not involve discrimination by government between two private speakers but discrimination by government against a private speaker and in favor of itself. In *United States Trust* v. *New Jersey*, 431 U.S. 1 (1977), a Contracts Clause case, the Court said: "Complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 25-26. If a State's impairment of the obligation of its own contract receives stricter scrutiny than its impairment of contractual obligations between private persons, surely government's self-interested decision to favor itself as a speaker should require much stricter First Amendment scrutiny than its decision to favor one group of private speakers over another. When a government discriminates against private speech in favor of its own speech, assuming that it may do so at all, government should have to meet a compelling interest standard.

(5) Finally, *Preferred* requires a trial to determine whether Niceville has adopted narrowly tailored means to achieve a

compelling state interest. Niceville, as noted, argues it needs a municipal system to obtain improved cable service and two-way interactive features, such as burglar alarms, traffic control and well metering. Warner, however, introduced substantial proof that Niceville can achieve those goals by means far less restrictive of speech than crushing the only existing private cable speaker and driving out a potential new entrant.

Nicevilie could request enhanced services from Warner, allow Cosmic or any other company that would provide such services to compete with Warner, or obtain two-way interactive burglar alarm and other services from privately-owned vendors who operate in Niceville. The City's own expert witness conceded that this was a far more feasible way to obtain interactive services than the City's elaborate proposal to build a bidirectional cable system (App. 90a-92a). Indeed, several of Niceville's council members admitted that they had not even studied the economic feasibility of, or need for, the two-way interactive services now advanced by Niceville as a major justification for a municipal system (App. 76a-78a, 95a-96a; *see also* App. 93a-95a).

In summary, the court of appeals repeatly ignored *Preferred's* command to develop a full factual record to test Warner's First Amendment allegations and the City's counter-allegations. Instead, the court decided novel and far-reaching First Amendment questions in a factual vacuum, laid down unprecedented, draconian, and erroneous legal principles, and, despite the district court's finding that unresolved material factual issues remain, found the "facts" itself. This was clear error. As *Preferred* makes clear, Warner is entitled to a trial on its First Amendment claim—a claim which implicates the public's paramount First Amendment rights to a free press.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

Sept. 12, 1990

No. 89-3273

WARNER CABLE COMMUNICATIONS, INC.,
an Illinois corporation,

Plaintiff-Appellant,

—v.—

CITY OF NICEVILLE,

Defendant-Appellee.

Ralph A. Peterson, Beggs & Lane, Pensacola, Fla., James E. Moore, Moore, Kesler & Moore, Niceville, Fla., Grant S. Lewis, LeBoeuf, Lamb, Leiby & MacRae, New York City, for plaintiff-appellant.

Gillis E. Powell, Sr., Powell, Powell & Powell, Niceville, Fla., Don J. Caton, William D. Wells, City Attorney's Office, City of Pensacola, Pensacola, Fla., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before

TJOFLAT, *Chief Judge*,
TUTTLE, and RONEY*, *Senior Circuit Judges.*

* *See* Rule 34-2(b). Rules of the U.S. Court of Appeals for the Eleventh Circuit.

TJOFLAT, *Chief Judge*:

Plaintiff below, Warner Cable Communications, Inc. (Warner), appeals from the district court's entry of summary judgment in favor of defendant below, the City of Niceville (City), on two of Warner's claims. Warner also appeals the judgment of the district court, entered in favor of the City after a bench trial, on a third claim. We affirm both judgments.

I.

The City of Niceville is a municipal corporation chartered, organized, and existing under the constitution and laws of the State of Florida. Warner is a corporation organized under the laws of the State of Illinois. Warner, through its predecessor corporation, began supplying cable television services to the City in 1971, pursuant to a franchise agreement with the City. The current franchise agreement between the parties was enacted by the Niceville City Council in 1980 as Ordinance 438.[1] It is a nonexclusive franchise, expiring in 1995.

Subsequent to the City's enactment of Ordinance 438, Congress passed the Cable-Communications Policy Act of 1984 (Cable Act),[2] Pub.L. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521 *et seq.* (Supp. V 1987)), which authorizes local governments to own and operate their own cable television systems, *id.* § 533(e). In 1985, after receiving numerous consumer complaints about Warner's service, the City began to explore the possibility of constructing and operating its own system. Following a favorable preliminary report from the outside firm commissioned by the city council to investigate the feasibility of such a system, a resolution concerning a City-owned cable system was submitted to the voters on

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1 The terms of the franchise that are relevant to Warner's due process claim will be set forth in the discussion of that claim, *see infra* part III.

2 In the Cable Act, Congress sought to establish a national policy for cable television systems, to encourage their growth, and to provide for uniform federal, state, and local regulation of such systems. *See* 47 U.S.C. § 521.

July 15, 1985. The resolution passed by an overwhelming majority.

Prior to the July 1985 vote, the City had granted a second nonexclusive cable franchise to a Warner competitor, Cosmic Communications, Inc. Upon learning of the City's plans to construct its own system, Cosmic determined that it could not compete as the third cable provider in Niceville. Cosmic then surrendered its franchise and successfully bid to become the City's consultant on the cable project. Cosmic conducted a second, more in-depth technical and financial feasibility study and reported that a City-owned system, charging a lower rate than Warner, could operate economically. The report contemplated that the City's system would attract more than fifty percent of Warner's Niceville subscribers.

In October 1985, the city council accepted Cosmic's report and enacted Ordinance 581, which authorized the City to issue revenue bonds for the purpose of constructing and operating a cable television system. Pursuant to state law, the City filed a bond validation petition in the Circuit Court for Okaloosa County. *See* Fla.Stat. § 75.01 *et seq.* (1989) (statutory mechanism for court approval of municipal bond financing). The court order granting the petition was appealed by Warner, which intervened in the proceeding, and was affirmed by the Florida Supreme Court. *See Warner Cable Communications v. City of Niceville*, 520 So.2d 245 (Fla.1988).

On November 5, 1985, Warner filed suit against the City, alleging that the City's conduct violated Warner's constitutional rights to freedom of speech and due process. Warner sought damages, a declaration that Ordinance 581 was unconstitutional, and injunctive relief against enforcement of the ordinance. Warner also alleged that the city's prospective editorial control over programming on the City's cable system would violate the Cable Act. When the City subsequently delegated editorial control to an independent commission, Warner amended its complaint to allege that such a delegation was barred by the Florida Constitution's prohibition against delegation of unfettered legislative authority.

After extensive discovery and submission of voluminous factual materials to the district court, both parties moved for summary judgment. The district court granted the city's motion for summary judgment on all but Warner's due process claim, holding that (1) the first amendment issue was not ripe; (2) the claim under the Cable Act was mooted by the creation of an independent editorial commission; and (3) the commission did not represent an unlawful "delegation" under the Florida Constitution or, in the alternative, the Cable Act implicitly preempted the Florida Constitution. After a bench trial, the district court denied the due process claim as well. Warner appealed, asserting as error (1) the district court's application of the wrong legal standard to the first amendment claim and its determination that the claim was not ripe; (2) the court's "misconstruction" of the due process claim; and (3) the court's conclusion that the city could, under the Florida Constitution, properly constitute an independent commission to assume editorial control.

II.

Warner challenges the constitutionality of Ordinance 581 on first amendment grounds. Warner's attack anticipates the eventual success of the City's entry into the cable business as Warner's competitor. According to Warner, the City will be able to offer lower prices to cable subscribers, which "will create a press owned and controlled by the government, and will silence the only private cable operator, thereby 'muzzl[ing] one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.' " (Quoting *Mills v. Alabama*, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966)).

The district court granted summary judgment to the City after deciding that the first amendment claim was not yet ripe. The court reasoned (1) that Warner had no protected first amendment interest in retaining its full Niceville market, undiminished by competition; and (2) that Warner could assert a valid first amendment claim only if the City's action

would have the effect of totally suppressing Warner's speech by driving Warner out of business. Since the outcome of the City's competition with Warner was by no means certain, the court held that Warner had failed to demonstrate an immediate, direct injury and that the claim was therefore not justiciable. We agree with the district court with respect to (1) above but disagree with respect to (2). We conclude that Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible. Accordingly, we affirm the district court's grant of summary judgment on the first amendment claim, although we rely in part of different grounds. *See Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48-49 (1st Cir. 1990) (appellate court may affirm district court's grant of summary judgment on any ground that appears in record).

Warner's argument is essentially as follows. If the state or a state agent, here the City of Niceville, prevents a cable speaker from communicating its message to the public, the state or state agent "silences" the speakers.[3] Where the prevention is only partial and stems from the state's regulation of the time, place, or manner in which the speech is conducted, the first amendment is violated unless the state demonstrates that the regulation is necessary to serve an important governmental interest.[4] Ordinance 581, enacted by

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3 Warner's opposition to the City's entry into the cable market is based solely on the City's being a government actor. Because its franchise was nonexclusive, Warner could raise no breach of contract claim against the City for franchising a second private cable operator. Nor could Warner argue that the City's second franchise to a private operator was "state action" that violated Warner's first amendment rights: that argument is foreclosed by *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), discussed in the text *infra*, where the Supreme Court suggested that a franchising authority *could not refuse* to franchise a second operator without having at least a sound reason for doing so.

4 Warner implicitly recognizes that Ordinance 581 does not target the content of Warner's speech and that the City does not have to meet the heavy burden of demonstrating a compelling governmental reason to support its action.

the City, will have the direct and foreseeable effect of diminishing—perhaps eliminating—Warner's share of the Niceville cable audience and is not necessary to serve an important governmental interest. Therefore, the ordinance will violate Warner's first amendment rights by preventing Warner from freely communicating its message to the citizens of Niceville.

An initial question that arose in early litigation of first amendment claims by cable television companies was whether such companies merely provide conduits for electronic impulses, as do telephone companies, or are "speakers" protected by the first amendment. *See generally* Brenner, Cable Television and the Freedom of Expression, 1988 Duke L.J. 329. In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), the Supreme Court resolved that question in part, recognizing that operation of a cable television system does implicate first amendment rights: at the least, a cable operator has a protected first amendment interest in its "original programming [and its] editorial discretion over which stations or programs to include in its repertoire." *Id.* at 494, 106 S.Ct. at 2037. In *Preferred*, the City of Los Angeles refused to grant a franchise to a second cable television operator in a particular area of the city, although there was sufficient physical capacity on public utility structures to carry more than one cable system. The Supreme Court remanded the case to the district court for factual exploration of the city's justification for restricting access to one cable speaker; the Court declined to express any opinion on the proper resolution of the first amendment question.

After *Preferred*, the full contours of a cable operator's first amendment right remain unshaped. Whatever those contours may be, however, we conclude that the right to be free from competition is not within them, even when the cable operator's most formidable competitor is a municipality.

Warner claims that, because the City's plan "abridges Warner's right to speak" without furthering an important governmental interest, it does not meet the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20

L.Ed.2d 672 (1968) (four-part test for justifying governmental regulation that incidentally impacts upon first amendment interests). Invocation of this standard, however, only reveals the unusual nature of Warner's prevention argument. Not only does Ordinance 581 not interfere in any way with Warner's programming decisions and editorial policies, it neither regulates the conduct through which Warner communicates its message nor restricts Warner's access to its audience. Whether or not the City's cable system becomes operative, Warner will continue to have access to the Niceville cable television market unimpeded by any newly imposed restrictions as to time, place, or manner. The assertion that the City's plan "abridges Warner's *right* to speak" (emphasis added) is simply inaccurate.

What the City's ordinance does abridge is the continuation of Warner's profitable position as the only speaker in a captive cable market. A City-owned cable system, if successful, will no doubt reduce the audience for Warner's speech and diminish the profitability of that speech. Such economic loss, however, does not constitute a *first amendment injury*. "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456, 49 L.Ed.d 310 (1976) (Powell, J., concurring). Warner's freedom of expression remains unimpaired by the City's plan. As the district court put it, "while the first amendment protects Warner's right to make its programming decisions, its right to disseminate its speech, and its viewers' concomitant right to receive the speech, the first amendment does not guarantee that someone will listen to Warner's speech, nor pay to listen." *See also National Mkt. Reports, Inc. v. Brown*, 433 F.Supp. 1301, 1304 (S.D.W.Va. 1978) (not every governmental action affecting press implicates first amendment; statute directing insurers to publish information in competing publication may result in less enthusiastic market for plaintiff's publication but would infringe only plaintiff's profits, not its first amendment rights).

When the competing speaker is the government, that speaker is not itself protected by the first amendment, but "[t]o find that the government is without First Amendment protection is not to find that the government is prohibited from speaking." *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir.1982) (en banc), *cert. denied*, 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983). "Even without First Amendment protection government may 'participate in the marketplace of ideas' and 'contribute its own views to those of other speakers.' " *Id.* (quoting *Community Serv. Broadcasting v. FCC*, 593 F.2d 1102, 1110 n. 17 (D.C.Cir. 1978)). Warner, however, raises the specter of government speech becoming so dominant as to "drown out" the voice of private speakers. This concern is misplaced in the context of the current case. We agree that the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers' access to that audience, and first amendment concerns would arise. For instance, if a city government builds a better soapbox, equipped with spotlights and powerful loudspeakers, next to the longstanding antique soapbox, in the city square, and if government speakers dominate the new soapbox, then speakers on the first soapbox do not truly have the opportunity to communicate their views even to those who might wish to hear them. The city would indeed be "drowning out" the voice of the private speakers. But if the soapboxes are equal and the city speakers simply attract more listeners because the listeners prefer the city's message, there is no "drowning out," no denial of access, and no first amendment violation. Although the government does not have a constitutionally-protected right to speak, its actions may promote the first amendment interest of making more speech available to the citizenry: the speaker on the first soapbox cannot demand to monopolize the information-seeking audience in the name of the first amendment. Like that speaker, under the City's plan, Warner retains unimpeded access to the Niceville cable

television viewers. It can decide for itself whether and what it wishes to continue to communicate to them.

Although our research has discovered no case involving a similar first amendment claim by a cable company against a would be government cable provider,[5] at least one media plaintiff has raised such a claim against government providers of information that might drive plaintiffs out of business. In *P.A.M. News Corp. v. Butz*, 514 F.2d 72 (D.C.Cir.1975), a corporation (P.A.M.) engaged in wire-service dissemination of agricultural information sought injunctive and declaratory relief against the United States Department of Agriculture (USDA). The USDA had long provided agricultural information to the public, utilizing a wire network that connected its nationwide branch offices in order to expedite the collection and dissemination of the information. In 1963, the USDA inaugurated a service whereby private parties could arrange for a "direct extension" off the USDA network and could

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5 The few cases that have dealt with this issue to date have involved situations that are factually different from the one before us. In *Consolidated Television Cable Ser. v. City of Frankfort*, for example, the Sixth Circuit held that a civil rights claim against a municipal cable provider, brought under 42 U.S.C. § 1983 (1988) and alleging *inter alia* a violation of a private cable company's first amendment rights, was barred by the doctrine of res judicata. 857 F.2d 354, 357-58 (6th Cir.1988), *cert. denied*, _____ U.S. _____, 109 S.Ct. 1537, 103 L.Ed.2d 842 (1989). Had the court reached the first amendment allegation, it would have had to consider the cable company's allegation that the municipality *denied it access* to utility poles.

In *City of Issaquah v. Teleprompter Corp.*, 93 Wash. 567, 611 P.2d 741 (1980) (en banc), the cable company challenged the municipality's proposed acquisition of the company's cable system, pursuant to a purchase-or-condemn provision in the parties' contract, in part as a violation of the company's first amendment rights. The Supreme Court of Washington rejected the cable company's argument, stating that, since the company did not dispute the city's right to deny a franchise initially without violating the company's constitutional rights.

> we have difficulty with the assertion that the city's reservation of the right to acquire the property at a later date somehow violates Teleprompter's rights. The argument in effect is that there is no right of free speech before awarding of a franchise but that, once granted, the franchisee acquires not only a franchise but a right protected by the First Amendment.

Id. at 579, 611 F.2d at 747-48.

thereby receive the news directly. P.A.M. alleged that the new direct extension service violated the corporation's first amendment rights. The court acknowledged that P.A.M.'s wire-service activity was protected by the first amendment but rejected P.A.M.'s first amendment claim, stating the "not every action which affects the press violates the first amendment." *Id.* at 277. The court explained:

> [W]e cannot endorse P.A.M.'s conclusion that the direct extension service represents an unconstitutional infringement on its first amendment rights because we conclude that the USDA's actions do not abridge any cognizable first amendment interest of appellant.
>
> . . . [T]he direct extension service does not result in a prior restraint or restriction on what appellant may publish, . . . nor does it impose any tax or penalty for the privilege of publishing. . . . What the news service represents is an increase of the public's access to information. . . . Moreover, . . . the Government's actions here further a cornerstone of the first amendment—the maximum distribution of information in the marketplace.

Id.

P.A.M. argued specifically that "it ha[d] been economically injured by [the] governmental action and ha[d] been placed at an insurmountable competitive disadvantage." *Id.* P.A.M. relied on *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), in which the Supreme Court invalidated a state tax imposed on newspapers with over a certain number of copies in circulation. The *P.A.M.* court disagreed that P.A.M.'s claim fell within the rationale of *Grosjean*, explaining that the tax involved there was not bad because it took money from the pockets of the press but because it seemed to be a "deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of constitutional guaranties." 514 F.2d at 278 (quoting *Grosjean* at 250, 56 S.Ct. at 449). The court concluded:

> That is not the case here. The Government is increasing, not limiting, the flow of information. The first amendment profits from this sort of governmental activity. . . . If P.A.M. performs a valuable press service through offering additional items of news and analysis, it will succeed and thrive in the marketplace. In sum, we hold that the wire extension service infringes no first amendment interest of appellant. In light of that conclusion, we need not balance the governmental interest behind the innovation against the alleged unconstitutional abridgement.

Id.

Similarly, in the case before us, we need apply no balancing test to the City's action. Because Warner retains the uninfringed right to send its messages to the Niceville audience, we hold that Warner's feared loss of profits, due to competition by the City-owned system, does not constitute a first amendment injury.

In conclusion, we note the contrast between the effect of the relief requested by Warner and the effect of the relief requested by the plaintiff cable company in *Preferred*. There, where an unfranchised company sought to enter a market dominated by one cable speaker under an exclusive franchise with the city, the city's refusal to allow more than one company access to the market imposed a direct limit on the number of speakers and thus prevented an increase in the quantity and variety of speech available to the Los Angeles cable audience. If the city could not "justify its abridgement of expressive activity." 476 U.S. at 496, 106 S.Ct. at 2038, the city's policy of granting exclusive franchises would be found invalid. The relief sought by the plaintiff cable company, if granted, would have had the effect of opening access to additional speakers, thereby *increasing* speech in the cable marketplace. The current case, however, does not involve a franchising authority's attempt to restrict speech by allowing only one cable operator access to its market. Warner would like the federal courts to prevent the City from communicating its own message to an audience that would like to receive

it, thereby *decreasing* speech in the cable marketplace. We do not believe that the first amendment requires such a result.

III.

In this appeal, Warner does not allege that the City's action constitutes a violation of Warner's constitutional right to substantive due process, *i.e.*, that the City's plan to construct and operate a competing cable system effects a "taking" of a liberty or property interest under the fifth and fourteenth amendments. Nor does Warner allege that any particular adverse decisions to date have been procedurally tainted. Rather, Warner's procedural due process claim rests on the theory that the City's conflict of interest, arising from its projected dual role as Warner's regulator and competitor, prevents it from fairly and impartially regulating a company with which it hopes eventually to compete.

Although we recognize Warner's legitimate concerns over the City's potential misuse of its position, we do not consider its due process claim ripe for adjudication at this time. For a claim to be ripe for decision in the federal courts, a plaintiff must generally show that "he has sustained or is immediately in danger of sustaining a direct injury" as a result of the allegedly unlawful conduct. *Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 2325, 33 L.Ed.2d 154 (1972) (quoting *Ex Parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 1, 82 L.Ed. 493 (1937)). Warner alleges neither an actual injury already sustained nor an immediately threatened injury likely to result from the City's dual—and, according to Warner, inherently partial—posture.

We note as an initial matter that Warner's argument that its franchise subjects it to "pervasive regulation" by the City trades on the implication that "regulation" by one contracting party, to which the other contracting party agrees, constitutes adjudication. We agree with Warner that due process requires "a fair trial in a fair tribunal," *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975).

In this case, however, the franchise is a contract between Warner and the City.[6] When the parties renewed this nonex-

6 Provisions of the contract relevant to the City's regulation of Warner are as follows. The franchise sets forth generally the conditions under which Warner is given the right to use public property for the construction, operation, and maintenance of its cable television system. Warner is required to maintain insurance for personal injury and property damage and to indemnify the City for any liability arising from Warner's negligence in operating or maintaining the system. Included in section 4 of the franchise is a procedure for the receipt and resolution of consumer complaints.

Section 6 of the franchise establishes rates for the installation of equipment and for basic subscriber services. Rate increases are allowed only with the approval of the city council, following a previously noticed public hearing.

In section 7, Warner agrees to "equitably and reasonably" extend cable service to all previously unserved areas within the City within 120 days of a subscriber's request. If the subscriber is in a "remote or inaccessible location," Warner has the right to charge the subscriber for material and labor involved in extending service. The City has the right to make a final and binding determination of a location's remoteness or inaccessibility.

Section 10 requires Warner to "substantially meet the material technical requirements" of the Federal Communications Commission (FCC). Once a year, the City may engage a mutually acceptable third party to examine Warner's technical data for compliance with FCC requirements and to conduct independent testing. There are express procedures for correction or negotiation of a settlement in the event of Warner's noncompliance. After these procedures are exhausted, the City has the right to revoke the franchise. Additionally, if Warner violates any of the substantive provisions of the franchise, the City may begin forfeiture proceedings in a court of competent jurisdiction.

Section 13 requires Warner to pay an annual franchise fee equal to five percent of its gross subscriber revenue from its Niceville service. The City has the right to inspect and audit Warner's revenue records at any reasonable time.

Finally, section 15 provides that upon expiration of the franchise the City has the right to purchase, at fair market value, the physical properties and assets used under the franchise. If this provision is invoked, a three-arbitrator panel is to determine fair market value.

Many of the franchise provisions remain unaffected by the Cable Act of 1984. *See* 47 U.S.C. § 544(c) ("In the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, subject to section 545 of this title, enforce requirements contained within the franchise for the provision of services, facilities, and equipment. . . ."). Other provisions, however, such as those dealing with rate increases and franchise fees, are superseded by the Cable Act. *See* text and note 7 *infra.*

clusive franchise, Warner was aware that the City itself might choose to compete in the cable market: a neighboring municipality was already providing cable service to its citizens, and Warner knew that the City had considered establishing its own system. Such nonexclusive franchise agreements between the government and private businesses contain no implied noncompetition clause. *See Madera Waterworks v. City of Madera*, 228 U.S. 454, 33 S.Ct. 571, 57 L.Ed. 915 (1913); *Skaneateles Water Works Co. v. Village of Skaneateles*, 184 U.S. 354, 362, 22 S.Ct. 400, 403, 46 L.Ed. 585 (1902). In the contract, then, Warner willingly agreed to submit to its potential competitor's sole discretion over certain matters: restoration of public property to "the reasonable satisfaction of the City" when such property is affected by construction or maintenance of the system; determination that a subscriber requesting service in a previously unserviced area was not in a "remote or inaccessible location," which meant that Warner must pay for the line extension; cost (up to $2500) of hiring a mutually acceptable consultant to collect Warner's technical data; engagement of a neutral third party to examine the technical data; city council approval of franchise assignment; and inspection of Warner's books at any reasonable time. If the City fails to exercise its contractual duty to act reasonably and in good faith with respect to the above decisions, Warner may well have a breach of contract claim against it, but, given Warner's contractual submission to the City's decision-making powers in these areas, Warner cannot cast the city's decisions as "regulation," far less "adjudication," implicating its right to due process. In the event of a third-party's (subscriber's) dispute with Warner, which the City is called upon to adjudicate, Warner might state a valid due process claim. There is, however, no such dispute before the court.

Second, it is unclear whether and to what extent the City will henceforth be called upon to act as a regulator independent of the contractual provisions between the two parties. The Cable Act limited the City's authority to regulate

Warner,[7] and to the extent that they are inconsistent, the Cable Act overrides the franchise agreement. In perhaps the most important provision for the case at hand, section 623 of the Cable Act limits a franchising authority's ability to regulate the rates charged by cable providers. That section authorizes the FCC to prescribe and enforce rules governing a franchisor's rate regulation in areas where the provider is "not subject to effective competition." *See* 47 U.S.C. § 543(b). The current FCC rule states in part:

> A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour . . . or whether they are significantly viewed within the cable community . . . . A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community.

47 C.F.R. § 76.33 (1989).

At trial, much energy was expended on the questions of how many broadcast television signals' Grade B contours covered the Niceville cable community and what signals were significantly viewed. Warner argued that it was not subject to effective competition and that the City could regulate its rates. The City maintained that Warner was subject to effective competition and therefore denied having any authority to regulate Warner's rates. The district court expressly declined to make factual findings on the issue. Our resolution of Warner's due process claim likewise does not require the issue to be settled: Warner has not requested the City's

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7 In addition to the provisions concerning rate regulation, discussed in the test *infra*, a number of the Cable Act's provisions limit a franchising authority's ability to regulate a cable operator. For example, the Act limits franchise fees to five percent of a cable provider's gross revenues, *see* 47 U.S.C. § 542(b), gives the FCC power to prescribe technical standards applicable to all cable systems, *see id.* § 544(e), and establishes specific procedures for modification, renewal, and sale of cable franchises, *see id.* §§ 545-547.

approval for any increase or decrease in its rates, nor has it expressed any desire to adjust its rates unilaterally. "The central concern [of the ripeness doctrine] is whether the case involves uncertain and contingent future events that may not occur at all." 13A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3532.1, at 112 (2d ed. 1984). The proper time to decide the effective competition issue is when a concrete dispute over rate regulation takes shape. In the present case, there is no such dispute to adjudicate.

Similarly, even in the permissible area of regulation clearly not covered by the franchise, Warner might make no requests of the City. If, when Warner wants to raise or, more probably, to lower its rates, the Niceville area is covered by three unduplicated broadcast signals, no request for a rate change will be necessary. And if Warner does make a request to perform some activity that requires City approval, the City may simply grant it—the record indicates at least that city council members are aware of the need to "maintain a level playing field" on which Warner and the City can compete. In short, given our rejection of Warner's first amendment claim, there is no live controversy, actual or immediately threatened, between the parties at this time.

We emphasize, in conclusion, that we do not foreclose the possibility that the City's dual role as Warner's regulator and competitor might, in particular circumstances, give rise to a valid due process claim. If a dispute arises in which the City is called upon to be " 'complainant, jury, judge and "executioner," ' " *Cruz v. Ferre*, 755 F.2d 1415, 1422 (11th Cir.1985) (quoting *Cruz v. Ferre*, 571 F.Supp. 125, 133 (S.D.Fla.1983)), there may exist an intolerably high risk of self-interested, unfair governmental action, particularly since the City's competitor in this case is a first amendment speaker. We recognized in *Cruz* that, because of the "potentially great impact upon first amendment rights[,] . . . regulation of a communicative activity must adhere to more narrowly drawn procedures than regulation of ordinary commercial activity." *Id.* Currently, however, Warner has brought no matter before the City for decision, and the City is threatening no regulatory action that will result in redress-

able injury to Warner. In the absence of any such controversy involving actual or threatened injury to Warner, our consideration of its procedural due process claim would be premature.

IV.

The district court advanced alternative grounds for holding that Ordinance 609, establishing an independent editorial programming board pursuant to the Cable Act, *see* 47 U.S.C. § 533(e)(2), did not offend the Florida Constitution's prohibition against the delegation of unrestricted legislative authority. The court held that Ordinance 609 delegated only the authority necessary for an administrative agency to carry out a legislative plan. The court also held that, to the extent that the two conflicted, the Cable Act, which forbids government owner-franchisors to exercise editorial control, preempted the state constitutional provision, so that the creation of an independent commission was not a delegation of any authority possessed by the City. We affirm, noting that both grounds of decision are intertwined.

Warner's unlawful delegation argument stems from article 2, section 3, of the Florida Constitution, which provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." First, we agree with the district court that, under Florida law, creation of the editorial board does not constitute the sort of delegation of unrestrained legislative authority contemplated by article 2, section 3. Interpreting that section, the Florida Supreme Court has held that while a legislative body

> may not delegate the power to enact a law; or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law[,[. . . it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated offi-

> cials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.

Florida State Bd. of Architecture v. Wasserman, 377 So.2d 653, 655 (Fla.1979) (quoting *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, 793 (1919)). The Florida court has also recognized that "the specifity of standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards." *Askew v. Cross Key Waterways*, 372 So.2d 913, 918 (Fla.1979).

Examination of Ordinance 609 reveals that it contains sufficient standards and guidelines to satisfy the requirements of article 2, section 3. The ordinance requires the editorial commission to select at least "thirty-seven (37) basic channels, which shall include government, educational and local access channels, and not less than five premium channels" and provides that "selection of these channels shall be made by the Commission in a manner consistent with the revenue and expense projections involved with the financing of the system." The ordinance empowers the commission to

> establish its own operating rules and regulations to govern its programming decisions and other decisions necessarily incidental thereto. The rules and regulations promulgated by the Commission shall provide for receiving input from the residents of the City of Niceville and they shall further provide for the holding of appropriate hearings prior to making any final determinations regarding program selection.
>
> . . . .
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> The Commission shall conduct such public hearings deemed helpful to gather information from the residents and citizens in performing its function. The Commission may make or cause to be made any necessary special studies on the location, condition, and adequacy of available programs and the desirability of any matters to be so transmitted.

Given the nature of the subject matter and the difficulty of articulating more finite standards while complying with the Cable Act's prohibition against editorial control by owner-franchisors, *see* 47 U.S.C. § 533(e)(2), the directives of the ordinance meet the flexible test of specifity articulated in *Askew*. We hold therefore that there was no delegation of unfettered legislative authority that would violate the Florida Constitution.

Second, even if there were an attempt to make an unlawful delegation here, the unlawful delegation doctrine applies only when a legislative body delegates authority that it in fact possesses. *See City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801, 803 (Fla.1972). As noted above, with certain exceptions not relevant here, the Cable Act preempted the ability of state and local governmental entities to exercise editorial or programming control over the content of any cable system in which the governmental entity has an ownership interest. *See* 47 U.S.C. § 533(e)(2). Because federal law prohibits a government owner-franchisor from exercising editorial control, the City could not delegate to the editorial board power that the City did not have. Thus, we hold that, in creating such a board, the City has complied with the federal statute and has not offended the Florida Constitution.

V.

For the foregoing reasons, the judgments of the district court are

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 85-4414-RV

WARNER CABLE COMMUNICATIONS, INC.,

Plaintiff,

—v.—

CITY OF NICEVILLE, FLORIDA,

Defendant.

ORDER AND MEMORANDUM OPINION

The plaintiff and defendant are parties to a cable television franchise in effect from 1980 through 1995. The plaintiff filed this action on November 7, 1985, seeking declaratory and injunctive relief and damages for alleged injuries arising from the enactment of Ordinance 583 by the defendant City. In adopting this ordinance, the City implemented its decision to compete with the plaintiff in the Niceville cable television market with a city-owned cable system. The plaintiff sought relief for alleged violations of its first amendment and fourteenth amendment rights, of the Cable Communications Policy Act of 1984, and of Florida law. All claims except the due process claim were dismissed in an order entered herein on April 11, 1988. (Doc. 180) The case proceeded to trial before the Court without a jury on May 16, 1988. The parties have fully briefed the issues involved. Upon consideration of all the evidence and in accordance with Rule 52, Federal Rules of Civil Procedure, I make the following findings of fact and conclusions of law.

I. *FINDINGS OF FACT*

Plaintiff Warner Cable Communications, Inc. ("Warner"), a wholly-owned subsidiary of Warner Communications, Inc., is a corporation organized under the laws of the State of Illinois. Warner provides cable television services in Niceville, Florida, under, a franchise agreement with the defendant. Defendant City of Niceville ("the City") is a municipal corporation chartered, organized and existing under the Constitution and laws of the State of Florida.

Warner began providing cable services within the City of Niceville in December 1971, pursuant to a franchise agreement with the City. Warner's Niceville service area includes the City of Niceville itself and some adjoining unincorporated portions of Okaloosa County, Florida, extending east of Niceville to and including the Blue Water Bay development. In its Niceville area system, Warner has between 6,000 and 6,500 customers, 3,554 of whom are located within the city limits of the City.

The current franchise agreement between Warner and the City was enacted as Ordinance No. 438, on February 12, 1980. It is a nonexclusive franchise extending until 1995. Under the franchise, Warner pays to the City a franchise fee of five percent of its annual gross subscriber revenues.

The franchise generally sets out the conditions under which the plaintiff is given the right to use public property for the construction, operation, and maintenance of a cable TV system. The franchise requires Warner to maintain insurance for personal injury and property damage and to indemnify the City for all its liability which may arise through the negligence of the plaintiff in the operation and maintenance of the system. Included in the franchise is a procedure for the receipt and resolution of consumer complaints.

Section (6) of the franchise provides for the rates to be charged for installation of equipment and for basic subscriber service. Increases in the basic rates must be authorized and approved by the City Council. Prior to October 30, 1984, the effective date of the Cable Communications Policy Act of 1984 [47 U.S.C. §§ 521 *et seq.*], Warner had sought and

received approval of the City of Niceville for basic rate increases, and Warner had never been denied a requested rate increase.[1] Rates for non-basic services may be set by Warner under the franchise in accordance with applicable Federal Communications Commission ("FCC") regulations.

Section (7) of the franchise requires Warner to "equitably and reasonably" extend service to all areas within the city limits within 120 days of a subscriber request. The plaintiff may charge the subscriber for material and labor if the subscriber is in a "remote or inaccessible location." The City Council has the authority to decide what locations are remote and inaccessible. Each time this issue has been raised regarding extensions to new subscribers, the Council has determined that the sites were not remote and inaccessible. Therefore, Warner had to bear the expense of extension for trunk cables.

Section (8) of the franchise makes it subject to all applicable FCC rules and regulations. Also, this provision provides that the law of Florida governs the franchise.

Section (10) requires Warner to meet the material technical requirements of the FCC for cable services. Once a year, the City may authorize a third-party review of Warner's compliance with these technical standards. After receipt of the report, the franchise provides express procedures for negotiating a settlement or correction if Warner is in fact not in compliance with the FCC standards. Once all the procedures have been exhausted, the City is given the right to revoke the

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1 In the Cable Communications Policy Act, Congress authorized the Federal Communications Commission to promulgate rules concerning rate regulation of cable systems by franchising authorities. 47 U.S.C. § 543(b); *see infra* note 3. However, the Act permitted continued rate regulation for basic services as provided in existing franchise agreements for the two years following the effective date of the Act. 47 U.S.C. § 543(c). The Act also allowed cable operators to increase any rate subject to regulation under the Act by five percent per year if the rates so charged would not be precluded by an existing franchise agreement. Following the effective date of the Act, Warner unilaterally imposed 5% rate increases in 1985 and 1986 without the approval of the City Council.

franchise if Warner has not corrected the problem or made reasonable attempts at correction.

Furthermore, if Warner violates any of the substantive provisions of the franchise, then the City has the right to institute forfeiture proceedings. Forfeiture may be declared only by a court of competent jurisdiction after a hearing. If the problems with the system arise from unforeseen events or events beyond the control of Warner, then the revocation and forfeiture proceedings may be forestalled.

Section (11) gives Warner the right to surrender the franchise by filing a written notice with the City Clerk 18 months before the surrender date. Assignment of the franchise can occur only on written approval of the City Council. Section (15) provides a procedure for the City's purchase of the physical properties and assets of Warner at the expiration of the franchise. In the alternative, the City has the right to renew the franchise or to negotiate a new franchise with Warner or another cable company. Section (19) declares: "This franchise shall be non-exclusive."

Subsequent to the enactment of Ordinance 438, the contractual relationship between Warner and the City was significantly altered by the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. §§ 521 *et seq.*).[2] In this Act, Congress sought to establish a national policy for CATV systems, to encourage the growth of cable TV, and to provide uniform guidelines for federal, state, and local regulation of cable services. 47 U.S.C. § 521. Specifically, the Act placed limitations on the authority of governments to regulate rates. *See* 47 U.S.C. §§ 542-543. The Act grants power to the FCC to establish technical standards, and franchising authorities may only regulate such services in a manner consistent with the Act.[3] 47 U.S.C. § 544. The Act

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2 In 1987, the Florida Legislature enacted minimum standards and procedures for the grant of cable television franchises. Ch. 87-62, Laws of Fla. (1987) (codified at Section 166.046, Fla. Stat.).

3 Pursuant to Section 624(e) of the Cable Communications Policy Act [47 U.S.C. § 544(e)], the FCC has adopted technical standards governing the

also provides for procedures on modification [47 U.S.C. § 545], renewal [47 U.S.C. § 546], and sale [47 U.S.C. § 547] of cable franchises. To the extent applicable, these federal guidelines pre-empt the terms of Ordinance 438.

In Section 623(a) of the Act, Congress provided that the states may not regulate rates for cable services except to the extent provided in that section. 47 U.S.C. § 543(a). In Section 623(b), Congress authorized the FCC to prescribe and enforce regulations concerning the regulation of rates for cable services in locations where the cable system is "not subject to effective competition." 47 U.S.C. § 543(b). Congress placed a two-year moratorium on the application of the FCC rules to existing franchise agreements. *Id.* Thus, as of October 30, 1986, the franchise agreement between the City and Warner became subject to the FCC rules.

The FCC adopted the existing rules in its Report and Order of April 11, 1985 (MM Docket No. 84-1296). 50 Fed. Reg. 18637 (1985); *see* 47 C.F.R. § 76.33 (1987). In these rules, the FCC defined "effective competition" as:

> A cable system will be determined to have effective competition whenever at least three unduplicated signals serve the cable community. Signals shall be counted if they place a Grade B contour (as defined in § 73.683 of our rules) over any portion of the cable community, are significantly viewed within the cable community (as defined in § 76.54 of our rules) or are translator stations licensed to serve the cable community, provided that the translators are not used to retransmit stations already providing Grade B contour or significantly viewed signals within the cable community.
>
> 47 C.F.R. § 76.33(a)(2) (1987).

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quality of cable TV signals. *See* 47 C.F.R. §§ 76.601, 76.605 (1987). The regulations preclude local authorities from imposing more stringent standards. 47 C.F.R. 76.605 note 1. The Supreme Court recently upheld pre-emption of state technical standards by the FCC and ruled that the FCC had acted within its authority in promulgating these rules. *City of New York v. Federal Communications Commission*, 486 U.S. _____, 108 S.Ct. _____, 100 L.Ed.2d 48 (1988).

This standard was invalidated by the District of Columbia Circuit Court of Appeals in *American Civil Liberties Union v. Federal Communications Commission*, 823 F.2d 1554, 1571-73 (D.C. Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988).

Prior to the trial in this case, the FCC adopted a new "signal availability standard" to comply with the *American Civil Liberties Union v. Federal Communications Commission* decision. *Second Report and Order* (MM Docket No. 84-1296, adopted March 24, 1988). The new rule states in part:

> A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in § 73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in Section 76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community.
>
> *Second Report and Order, supra*, at 31.

The revised standard became effective on October 29, 1988. Both the old and new rules provide that any party may petition the FCC for relief from the standards. 47 C.F.R. § 76.33(e) (1987).

Much evidence was presented at the trial in this case concerning the number of television broadcast signals whose Grade B contours cover the Niceville cable community. The plaintiff claimed that it was not subject to effective competition, and therefore, the City had the authority to regulate its rates. The City argued that Warner was subject to effective competition, and therefore, it had no authority to regulate Warner's rates. City Councilman Gary Brown testified that, according to the information provided to him by the City's attorneys and its cable consultant, the City could not control

the rates of Warner. Whether Warner is subject to rate regulation by the City would not affect my decision in this case. Accordingly, I make no factual finding on the issue whether Warner is subject to effective competition within the meaning of the Act and the FCC rules.

The Cable Communications Policy Act also authorizes local government ownership of cable TV systems. 47 U.S.C. § 533(e). In 1985, the City Council appointed a committee to study the possibility of operating its, own cable system. After receiving a favorable commmittee report, the City Council commissioned a feasibility study, which also resulted in a favorable report. A resolution was placed on the July 16, 1985, ballot concerning the issue of a city-owned cable system, and the resolution passed by a large majority.

The City hired a consultant to perform technical and financial feasibility study. The study found that the City could economically operate a system in competition with its franchisee at rates lower than those charged by Warner. The consultant's report was accepted by the City Council on October 8, 1985.

On October 16, 1985, the City Council enacted Ordinance 583, which provided for the issuance of revenue bonds not exceeding $2 million for the purpose of constructing and operating a cable TV system. Warner filed this suit on November 7, 1985.

The bond validation petition was filed in the Circuit Court for Okaloosa County, Florida, and the court entered an order granting the petition on August 5, 1987. The plaintiff intervened in this proceeding and appealed the judgment of the court. The Supreme Court of Florida affirmed the decision prior to the trial of this action. *Warner Cable Communications v. City of Niceville*, 520 So.2d 245 (Fla. 1988).

II. *CONCLUSIONS OF LAW*

This Court has jurisdiction in this matter and over these parties, pursuant to Title 28, *United States Code*, Sections 1331, 1343, and 2201.

The plaintiff claims that the defendant's enactment of Ordinance 583 deprives it of property without due process of law in violation of the fourteenth amendment because the City has become both the plaintiff's regulator and competitor. Specifically, the plaintiff argues that the City Council cannot sit as an impartial tribunal for making decisions concerning the franchise because the City is itself a direct CATV competitor of the plaintiff. The plaintiff argues that the City has an irreconcilable conflict of interest which renders it incapable of fairly regulating with "due process" as required by the Constitution. No particular adverse decision has been presented to show a deprivation of property interests. In essence, the plaintiff's claim is that a per se violation of the fourteenth amendment due process clause occurs when a governmental authority enters into direct competition with its regulated cable TV franchisee.

The fourteenth amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *U.S. Const.*, 14th amend. Generally, to show a violation of due process, the plaintiff must demonstrate (1) a life, liberty, or property interest (2) of which it has been deprived by state action (3) without sufficient due process protections. *See Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Parratt v. Taylor*, 451 U.S. 527, 536-37, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Economic Development Corp. v. Stierheim*, 782 F.2d 952, 953-54 (11th Cir. 1986).

The plaintiff's argument focuses on the third element of this claim . . . sufficient due process involving a state-imposed deprivation of property. The plaintiff assumes that the decisions of the City Council in relation to the franchise will inevitably deprive it of constitutionally-protected property interests. Therefore, the decisionmaking process itself cannot function to provide the requisite due process.

Conceptually, the plaintiff's *per se* due process claim is founded on the structural conflict of interest inherent in the two distinct roles the City will play in regulating a business competitor. What procedures are required for due process are not invariable; due process is flexible and requires the proce-

dural protections commensurate with a certain situation. *Little v. Streater*, 452 U.S. 1, 5-6, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1976). In order to determine what process is due, a court must consider: (1) the private interests at stake; (2) the risk that the procedures used will lead to an erroneous deprivation and the probable value of the suggested procedural safeguards; and (3) the governmental interest affected. *Little v. Streater*, *supra*, 452 U.S. at 13; *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 78 (1976). The basic requirements of due process are notice and an opportunity to be heard. *E.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). An impartial tribunal is not always required. *See, e.g., Holley v. Seminole County School District*, 755 F.2d 1492, 1497-98 (11th Cir. 1985). Furthermore, for some deprivations of property, there may be adequate state remedies to redress the damage, so that providing more or better procedural process would not be necessary under the Constitution. *See Parratt v. Taylor*, *supra*, 451 U.S. at 521.

It is true, of course, that in certain instances an impartial decisionmaker is required under the due process clause. *See, e.g., In re Murchison*, 349 U.S. ,133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1684, 36 L.Ed.2d 488 (1973). In some cases, the risk of intolerable unfairness is so great that the procedure provided constitutes a per se violation of the constitution. *See Withrow v. Larkin*, *supra*, 421 U.S. at 58. However, in such cases, it is clear that the intolerable risk includes adjudication of a specific, identifiable property interest. *See Gibson v Berryhill*, *supra*, 411 U.S. at 564 (delicensing procedure for optometrists); *United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693 (7th Cir. 1982) (adjudication of right to real property); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (regulation of "indecent material" shown over cable TV). Thus, before I can determine whether the impartial tribunal requirement is triggered, I must identify the

property interests which are threatened by the enactment of Ordinance 583.

In order to have a property interest in a benefit, a person must have a legitimate claim of entitlement to the benefit, not just an abstract need or desire for it, which arises from sources other than the Constitution, ordinarily state law. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause'." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

The plaintiff has advanced various interests which it claims are property interests protected under the constitution.[4] First, the franchise itself constitutes a benefit in which the plaintiff has a protected property interest under state law. *See Leonard v. Baylen Street Wharf Co.*, 59 Fla. 547, 52 So. 718 (1910); *North Dade Water Co. v. Florida State Turnpike Authority*, 114 So.2d 458, 460 (3d DCA 1959), *cert. denied*, 120 So.2d 620, and *appeal dismissed*, 120 So.2d 621 (Fla. 1960); *see also Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). However, it is undisputed that the franchise has not been revoked, nor are revocation proceedings threatened by the City. The plaintiff's authority to provide cable TV service to the residents of the City of Niceville has not been challenged or threatened. Therefore, there has been no deprivation of property that would support a claim under the fourteenth amendment with respect to the plain-

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4 Warner has also claimed that the City as regulator and competitor will infringe its first amendment liberty interest in its cable communication. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983). This argument was raised in Count I of the plaintiff's complaint, on which I granted the defendant's motion for summary judgment. (Doc. 180) I found that the enactment of Ordinance 583 did not infringe nor threaten to infringe on the constitutionally-protected speech rights of the plaintiff. That is the law of this case.

tiff's property interest in the franchise. *See Wells Fargo Armored Service Corp. v. Georgia Public Service Comm'n*, 547 F.2d 938 (5th Cir. 1977).

The only threatened (and likely) injury to the plaintiff's franchise is damage which arises from competition with the proposed City cable system. Economic injury resulting from mere lawful competition does not implicate the plaintiff's property interest in the franchise. *See Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); *Skaneateles Water Works Co. v. Skaneateles*, 184 U.S. 354, 22 S.Ct. 400, 46 L.Ed. 585 (1902); *Green v. Ivey*, 45 Fla. 338, 33 So. 711 (1903); *Boyd v. Bonded Garages, Inc.*, 160 So.2d 724 (3d DCA), *cert. denied*, 166 So.2d 593 (Fla. 1964).

The Supreme Court of the United States has held that the fourteenth amendment does not preclude a city from operating a business in competition with private business and regulating the private business through its lawful powers. *See City of Pittsburgh v. Alco Parking Co.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974); *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1934). Where a private business has a nonexclusive franchise, damage resulting from lawful competition by the state is *damum absque injuria*, and will not support a claim for depriving the private business of property without due process of law. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, *supra*, 306 U.S. at 118; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938).

If the City's decision to compete with its franchisee involved a "conspiracy or fraud or malice or coercion" to drive the plaintiff out of business, then the general rule allowing competition would not apply. *See Alabama Power Co. v. Ickes*, *supra*, 302 U.S. at 478. Also, unreasonably burdensome regulation, in combination with competition by the regulator, may amount to a taking of property without just compensation in violation of the fifth and fourteenth amendments. *See City of Pittsburgh v. Alco Parking Co.*, *supra*, 417 U.S. at 379 (Powell, J., concurring). However, the mere

fact that the City competes and regulates is not sufficient to show deprivation of a protected interest.

The defendant here has the authority to own a cable system. *See* 47 U.S.C. 533(e); *Warner Cable Communications v. City of Niceville*, 520 So.2d 245 (Fla. 1988). The franchise ordinance is expressly "nonexclusive" and contains no provision precluding competition by the City. Furthermore, the Supreme Court has determined that franchise agreements between the state and private businesses contain no implied noncompetition clause. *See Madera Water Works v. Madera*, 228 U.S. 454, 33 S.Ct. 571, 57 L.Ed. 915 (1913); *Skaneateles Water Works Co. v. Skaneateles*, *supra*, 184 U.S. at 354. Thus, the City may compete with the plaintiff during the course of the franchise without implicating the fourteenth amendment.

The plaintiff has pointed to no evidence of fraud, collusion, malice, or conspiracy in the City's decision to compete with Warner in the cable TV business. The City is admittedly attempting to provide cable TV service at a lower cost than the plaintiff. Whether the City will be able to do this, or to even compete effectively with the plaintiff, is mere speculation at this point.

The risk of competition was present at the time Warner entered into the franchise agreement. While the franchise itself is constitutionally-protected property, it does not confer a contractual or property right to be free from lawful competition by another private business or by the franchising authority.[5] *See Tennessee Electric Power Co. v. Tennessee*

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5 Under Florida law, a governmental franchisee can sue to enjoin unlawful competition. *See Tampa Electric Co. v. Withlacoochee River Electric Coop.*, 122 So.2d 471 (Fla. 1960); *St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co.*, 149 Fla. 14, 5 So.2d 55 (1941); *cf. Frost v. Corporation Commission*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929). Florida law thus protects against economic injury to a governmental franchisee from competition with a competitor not lawfully franchised or otherwise acting outside the law. Warner, therefore, has a legitimate claim of entitlement to be free from economic injury through unlawful competition.

Valley Authority, *supra*, 306 U.S. at 139; *Rio Grande Valley Gas Co. v. City of McAllen*, 152 F.2d 591 (5th Cir. 1945). Thus, the threatened competitive injury to the plaintiff's interest in the franchise does not implicate the fourteenth amendment.

The plaintiff also claims that it has a property interest in the use and enjoyment of its franchise, including the right to pursue its business and make a return on its investment. These interests, like the interest in the franchise itself, are protected under the fourteenth amendment. *See*, *e.g.*, *Terrace v. Thompson*, 263 U.S. 197, 215, 44 S.Ct. 15, 68 L.Ed. 255 (1923); *Buchanan v. Warley*, 245 U.S. 60, 74-75, 38 S.Ct. 16, 62 I,.Ed. 149 (1917). Possession of the franchise would, of course, be useless without the opportunity to "do business" and earn a fair return. However, there is nothing in the record to demonstrate the present or threatened impairment of these rights by the City. In the cases cited by the plaintiff, state action had actually precluded the claimant from some particular use of its property. *See Henkels v. Sutherland*, 271 U.S. 298, 46 S.Ct. 524, 70 L.Ed. 953 (1925) (interest income on proceeds of property wrongfully seized and sold by the government); *Terrace v. Thompson*, *supra*, 263 U.S. at 197 (statute precluding lease of land to aliens); *Buchanan v. Warley*, *supra*, 245 U.S. at 60 (statute regulating occupancy of property by race).

In this case, the use and enjoyment of the franchise is threatened only by competition from the franchisor. The fourteenth amendment does not protect against loss of

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This issue has not been addressed directly by the parties, although several aspects of the case have been related to it. For example, in the summary judgment order of April 11, 1988, I found that operation of a cable TV system was a municipal purpose under Florida law. (doc. 180) *See also Warner Cable Communications v. City of Niceville*, 520 So.2d 245 (Fla. 1988). I also found that the defendant had not violated the unlawful delegation doctrine under Florida's Constitution. (doc. 180) In the petition for bond validation proceedings, the state court found that Ordinance 583 had been adopted and enacted in accordance with the city charter and laws of the state. *City of Niceville v. State*, Case No. 86-2427-C (Cir. Ct. Okaloosa Cty. August 5, 1987), *aff'd*, 520 So.2d 245 (Fla. 1988).

patronage due to competition. *See Public Service Comm'n v. Great Northern Utilities Co.*, 289 U.S. 130, 53 S.Ct. 546, 77 L.Ed. 1080 (1933). As with the franchise itself, the effect of competition on these property interests does not provide a deprivation within the meaning of the fourteenth amendment.

The plaintiff also claims that various property rights incident to the franchise will be infringed by the City's action. For example, the plaintiff claims a property right in contracting for services with customers as necessary and proper incident to carrying on its business. If Ordinance 583 imposed some burden or obstruction on the ability of the plaintiff to make contracts with citizens of Niceville for cable TV services, then the fourteenth amendment may be implicated. However, that is not the situation in this case. Ordinance 583 does not impair the ability of the plaintiff to contract for services. Clearly, whether the plaintiff will contract with individuals for cable TV may be affected by competition from the City. However, the franchise contains no entitlement to a specific citizen's business, nor to any certain number of subscribers. It only authorizes Warner to freely contract with willing citizens for cable TV. The plaintiff holds the same rights in this regard as it did prior to the enactment of Ordinance 583. Thus, its interest in contracting with citizens as an incident to its business has not been impaired.

The plaintiff also claims a property interest in not bearing the expense of extension of service lines to remote or inaccessible locations and in assignment of its franchise to a third party. In these instances, the plaintiff simply has no constitutionally-protected property interest. The franchise gives the City the discretion to decide what is a remote or inaccessible area and whether the plaintiff may assign the franchise.

In summary, I find that the plaintiff has suffered no actual or threatened deprivation of property within the meaning of the fourteenth amendment. The fact that the defendant has become both its competitor and regulator does not, without more, implicate due process. Therefore, the plaintiff's claim must fail.

Accordingly, the Clerk shall enter a judgment in favor of the defendant and against the plaintiff on Count III of the complaint, with taxable court costs.

DONE AND ORDERED this 10th day of March, 1989.

/s/ ROGER VINSON
Roger Vinson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PCA 85-4414-RV

WARNER CABLE COMMUNICATIONS, INC.,

Plaintiff,

—v.—

CITY OF NICEVILLE, FLORIDA, *et al.*,

Defendants.

ORDER

The plaintiff holds a franchise agreement from the defendant municipality to provide cable television service. The defendant is in the process of constructing and operating its own cable TV system in competition with the plaintiff. In this suit, the plaintiff seeks to enjoin the establishment of the city-owned system. The plaintiff alleges that the bond validation ordinance for the city system is unconstitutional because, *inter alia*, it violates the plaintiff's first amendment and due process rights. Pending are cross motions for summary judgment. This order addresses the various issues raised in the motions.

I. Background.

Plaintiff Warner Cable Communications, Inc. ("Warner"), a wholly-owned subsidiary of Warner Communications, Inc., is a corporation organized under the laws of the State of Illinois. Warner provides cable television services in Niceville, Florida, under a franchise agreement with the defendant City

of Niceville ("the City"). Defendant City of Niceville is a municipal corporation chartered, organized, and existing under the Florida Constitution and laws of the State of Florida.

Warner began providing cable services to the City through its predecessor corporation in December 1971. The current franchise agreement between Warner and the City was enacted as Ordinance No. 528, on February 12, 1980. It is a nonexclusive franchise and extends until 1995. Under the franchise, Warner pays to the City a five percent franchise fee based upon gross subscriber revenues per year. Warner agreed to "equitably and reasonably" extend trunk cable to all areas within the city limits, with the City Council making the final determination concerning remoteness or inaccessibility. The City also has the authority to regulate rates and service.

Warner's Niceville service area includes the City of Niceville and some surrounding unincorporated portions of Okaloosa County, Florida. In this area, Warner has between 6,000 and 6,500 customers, 3,554 of whom are located within the city limits. Warner also has three other cable TV systems within the West Florida area. Since 1984, Warner has been operating in competition with another private system at the Sandestin Resort. Although Warner has lost 70% of its customers in that system, it has continued its Sandestin operations.

In the Spring of 1979, during the last year of Warner's first fifteen-year franchise agreement with the City, the City considered alternatives to the renewal of Warner's franchise. These alternatives included: (a) utilizing the cable system owned and operated by its neighboring municipality, Valparaiso, Florida, and (b) constructing its own cable TV system. The City went so far as to commission a feasibility study for a municipally-owned system.

The City remained undecided through the expiration of Warner's franchise. Warner then filed suit to force the City to either renew the franchise or buy its system. That litigation was terminated when the City decided to renew Warner's franchise in 1980.

Following the renewal, the City Council members began receiving consumer complaints concerning the cable service. These complaints involved Warner's programming, the company's nonresponsiveness to customer complaints, poor reception and technical service, and the fee schedule.

In March 1984, the City Council conducted a survey of citizens regarding an alternate cable system. Most of those who responded indicated that they would favor an alternative cable TV system. In October 1984, the City granted a franchise for competing cable TV services to Cosmic Communications, Inc., by enacting Ordinance No. 552. Cosmic surrendered this franchise less than a year later without having become operational.

At the beginning of 1985, the City Council learned that the Cable Communications Policy Act of 1984 [47 *U.S.C.* §§ 521 et seq.] authorized local government ownership of cable TV systems. 47 *U.S.C.* § 533(e). The City Council appointed a committee to study the possibility of operating its own system. In the Spring of 1985, the City received a recommendation from the committee that the matter be pursued further.

The City then commissioned a feasibility study by a private firm. After receiving what it deemed to be a favorable report, the City Council passed Resolution 85-20, which placed the issue of a City-owned cable system on the municipal election ballot for July 16, 1985. Warner vigorously opposed the resolution through a public advertising campaign. The resolution, however, was approved.

Following the referendum, the City took further steps toward implementing its own cable TV system. It commissioned Cosmic as a consultant for an in-depth technical and financial feasibility study. It also authorized the preliminary steps of a bond issue to finance the municipally owned system.

The Cosmic feasibility report was accepted by the City Council on October 8, 1985. On October 16, 1985, the City Council enacted, on third reading, Ordinance No. 583, which provided for the issuance of revenue bonds not exceeding $2 million for the purpose of constructing and operating a cable TV system. On December 9, 1986, the City Council

voted to adopt, on third reading, Ordinance No. 609, which established an independent programming board for the purpose of controlling the editorial content of the City system. On August 26, 1987, the City filed a bond validation petition in the Circuit Court for Okaloosa County, Florida.

Warner filed this suit on November 7, 1985. Warner alleges various constitutional and statutory claims arising from the City's decision to construct its own cable TV system. Warner also intervened in the bond validation hearing; a separate suit involving different claims, but the same parties, is being litigated in state court.

II. Discussion.

The defendant has filed a motion for summary judgment on all six counts of the complaint. (Doc. 105) The plaintiff has filed a motion for partial summary judgment on Count IV of the complaint. (Doc. 118) After reviewing the materials submitted and the arguments of the parties on the legal issues, I rule as follows on each count of the complaint.

(A) *First Amendment.* Warner has alleged in Count I of its complaint and has sought to show factually that the entry of the City into the Niceville cable TV market will drive Warner out of business. Warner contends that the Cable TV market in Niceville is a natural monopoly and that the City plans to take advantage of its favorable revenue-raising powers and tax-free status to provide expanded service to the citizens of Niceville at a lower cost. Warner claims that it will be unable to compete with the City on these terms and that its "voice" will be inevitably suppressed in violation of the first amendment.

The Supreme Court of the United States addressed the first amendment interests of cable TV operators in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. ____, 106 S.Ct. ____, 90 L.Ed.2d 480 (1986). In that case, the city refused to grant a franchise to the cable company, and the city utility department refused to allow the company access to its poles or underground conduits for the purpose of setting

up a cable system. The district court dismissed the cable company's first amendment claim, the Ninth Circuit reversed, and the Supreme Court affirmed that the complaint stated a claim under the first amendment. The Court specifically held that the cable operator had a protected first amendment interest in its "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire." 90 L.Ed.2d at 487. The Court, however, did not articulate what standard of review was appropriate for violations of cablespeech rights, nor did it indicate the degree to which the first amendment protects the rights of cablespeakers.

The standards of review actually applied to cable TV indicate that CATV systems have been treated as hybrids of the print and broadcast media. For example, when a regulation directly infringes on a cable operator's programming decisions, courts have generally invalidated the regulations as content-based restrictions for which there was no compelling government interest. *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) (invalidating FCC must-carry rules), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978) (indicating FCC mandatory access rules violated first amendment rights of cable operators), *aff'd* 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). On the other hand, governmental restrictions on the ability of a cable operator to "speak," such as the denial of a franchise agreement, are usually upheld as content-neutral and. necessary to further important government interests. *See, e.g., Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982).

These cases have generally been resolved by the standards enunciated for review of more traditional first amendment claims. When a government regulation directly curtails expression or indirectly burdens speech by favoring one view-

point over others, the government bears a heavy burden to sustain the regulation by showing the restriction is "necessary to advance a significant and legitimate state interest." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984); *see Quincy Cable TV, Inc. v. FCC*, *supra*, 768 F.2d at 1450-51. However, when the regulation is content neutral, it is valid if it "furthers an important or substantial government interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 319 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *see Arcara v. Cloud Books, Inc.*, 478 U.S. ____, 106 S.Ct. ____, 92 L.Ed.2d 568 (1986).

The recitation of these standards demonstrates the unusual nature of Warner's suppression argument. Ordinance 583 does not infringe on the programming decisions of Warner. The plaintiff has the unfettered discretion to exercise editorial control over its content and programming. Ordinance 583 also does not restrict the ability of Warner to communicate its message. The plaintiff still has access to the Niceville cable TV market. Thus, unlike the plaintiff cable companies in the cases cited above, Warner is not burdened with programming regulation nor has it been denied access to cable TV viewers.

It is not clear that Ordinance 583 implicates the first amendment interests of Warner in any way. Ordinance 583 is not on its face content-based. It neither directly curtails Warner's protected first amendment interests, nor does it indirectly burden speech by favoring the viewpoint of the City over Warner's. *See, e.g., Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir. 1982) (although not protected by first amendment, government may speak), *cert. denied*, 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983). Apparently recognizing that Ordinance 583 places only an incidental burden on speech, the plaintiff argues that the ordinance furthers no legitimate government purpose and the restriction on speech is greater than necessary.

The problem with this argument is that Ordinance 583 does not clearly place any restriction on Warner's protected speech interests. There is no restriction on the time, place, or manner in which Warner may exercise its programming decisions or communicate its message. The gravamen of the claim is that the ordinance will reduce the quantity and profitability of Warner's speech. However, "[t]he injury for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *Young v. American Mini Theatres*, 427 U.S. 50, 78, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Powell, J., concurring). Thus, while the first amendment protects Warner's right to make its programming decisions, its right to disseminate its speech, and its viewers' concomitant right to receive the speech, the first amendment does not guarantee that someone will listen to Warner's speech, nor pay to listen.

Thus, in order for Ordinance 583 to restrict the protected speech interests of Warner, it must have the effect of totally suppressing Warner's speech, as the plaintiff has argued. However, while the scenario depicted by Warner is certainly a possible result of the City's venture into the Niceville cable TV market, it is by no means the only result. As discussed below, the natural monopoly rationale simply does not support Warner's position, and there are a variety of factors that will influence the outcome of this competition that cannot be determined at this point. Therefore, Warner's claim that Ordinance 583 will effect an unconstitutional suppression of its speech does not present a justiciable claim or controversy for decision.

Warner is relying upon the alleged natural monopoly characteristics of the cable TV industry to show an injury to its first amendment rights. Other cases have considered this characteristic of the cable industry in another posture. For example, the franchising authority has argued that the natural monopoly produced by cable TV justified governmental regulation of the number of cable franchises. *See Omega Satellite Products Co. v. City of Indianapolis*, *supra*, 694 F.2d at 119; *Community Communications Co. v. City of Boulder*,

supra, 660 F.2d at 1370. In such circumstances, the natural monopoly characteristics of the cable TV industry is a factor in determining whether the franchising authority was justified in choosing one cablespeaker over others. These cases do not suggest, however, that the first amendment is implicated when one of two cablespeakers is unable to communicate its message because of the economic conditions of the relevant community.

It also may be true that only Warner or the City would survive a competitive market. However, it is by no means certain that Warner must inevitably lose. Numerous events must occur before that result can be reached. First, the City's system must become operational. The City may not finalize the financing; it may never become operational for technical problems. Assuming that the City system does become operational, it may suffer from the same consumer problems that have plagued Warner. The citizens of Niceville may prefer Warner's system after all.

Furthermore, the outcome of a competition between Warner and the City will depend on what actions Warner takes in the future. Presumably, as the record indicates it has done in similar situations, Warner will attempt to compete with the City system. What effect this will have on the market is simply not capable of determination at this point. Even if there was evidence establishing that only one system can survive in Niceville, it cannot be said now that Warner will inevitably lose.

The allegations of the plaintiff concerning the effect of Ordinance 583 raise a substantial question whether Count I presents a justiciable claim. A federal court only has the power to adjudicate actual cases and controversies. *U.S. Const.* art. III, § 2, cl. 1. While it may be possible to envision a series of events which would result in some concrete injury to protected interests, in order to present a justiciable claim, a plaintiff must generally show that "he has sustained or is immediately in danger of sustaining a direct injury" as a result of the allegedly unlawful conduct. *Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972); *see also Roe v. Wade*, 410 U.S. 113, 127-28, 93 S.Ct. 705, 35

L.Ed.2d 147 1973); *Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

A claim based on conduct that only presents a potential for unconstitutional application is considered not yet ripe and deprives a court of subject matter jurisdiction. Ripeness doctrine implicates both Article III and prudential, discretionary policy reasons for declining jurisdiction. "The central concern is whether the case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3532, at 122 (2d ed. 1984).

Just because a person has a protected interest that may be injured if certain events occur does not mean that a federal court may adjudicate the claim within the bounds of Article III. *See United Public Workers v. Mitchell*, 330 U.S. 75, 89-91, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). For a claim to be ripe, it must present an immediate and direct injury, and delay in resolution must adversely affect the interests of all parties. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

In deciding whether a claim is ripe, courts consider a number of factors reflecting Article III and prudential concerns. Injuries which are simply too remote or uncertain generally do not present ripe controversies. *See, e.g., Johnson v. Sikes*, 730 F.2d 644 (11th Cir. 1984). Where the effect of the law remains speculative, the case is also not considered ripe. *See, e.g., Metzenbaum v. Federal Energy Regulatory Comm'n, supra*, 675 F.2d at 1282. A lack of ripeness is also indicated where the course of future events is contingent on actions in the control of the parties themselves. *See, e.g., United Public Workers v. Mitchell, supra*, 330 U.S. at 75; *Zemel v. Rusk, supra*, 381 U.S. at 18-20.

In the context of the first amendment, ripeness concerns are considerably relaxed to avoid the chilling effect of an unconstitutional ordinance. *See, e.g., International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817-26

(5th Cir. 1979). This is especially true when there is only one person against whom a regulation affecting protected first amendment interests can be applied. *See, e.g., Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 500 (7th Cir. 1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). And when lack of resolution will present a real hardship to the parties, there is more reason to find the case ripe. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., supra*, 438 U.S. at 81-82.

All these factors are brought into play by the suppression argument advanced by Warner. The plaintiff has asserted a first amendment injury; however, Ordinance 583 does not directly regulate those aspects of Warner's operations in which it has a protected first amendment interest. Unlike cases in which the plaintiff appears likely to engage in protected, yet prohibited, first amendment activity, in this case the plaintiff is engaging in the protected activity and the regulation does not prohibit it from continuing. Suppression of Warner's first amendment interests will occur, if at all, through the economic injury it may (or may not) suffer.

It is also true that the plaintiff is the only person whose cablespeech will be affected by the entry of the City into the cable market. However, the nature of the cable industry seems to insure that there will generally be only one competitor when another cable system enters a market. Warner may be able to prove a first amendment violation if it can show that its "voice" was targeted for suppression by the City.

I also recognize that there can be severe hardship to the parties in not deciding whether suppression of Warner's voice through Ordinance 583 would violate the first amendment. The City may build its system at great expense, and Warner may suffer economic loss before the claim becomes ripe. However, the speculative nature of the claim outweighs this factor.

Accordingly, I find that any claim based on the effect of Ordinance 583 as totally suppressing Warner's speech is simply not ripe for adjudication. The defendants' motion for summary judgment on that aspect of Warner's first amend-

ment claim is hereby GRANTED, and the plaintiff's first amendment claim is DISMISSED, without prejudice.

(B) *Overbreadth*. Count II of the complaint challenges Ordinance 583 on overbreadth grounds because it allegedly impairs the protected speech interests of cable TV operators not before the court. A statute may be challenged as facially unconstitutional when any attempt to enforce the legislation would create an unacceptable risk of suppression of protected first amendment activity. A facially unconstitutional statute can never be applied validly. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-98, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

An overbreadth challenge may be brought when statutes have such "a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Id.* at 798 (footnote omitted). Thus, although the party before the court could have the statute applied to him if narrowly construed, a court can allow the overbreadth challenge to prevent the chilling effect of the statute on others not before the court. *Id.* at 798-801. When the statute regulates conduct and speech, the overbreadth must be substantial in relation to the valid applications of the statute. *Id.* at 799-800; *see Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

After a thorough analysis of the issue presented in Count II, however, it is apparent that it is not necessary to determine whether Ordinance 583 is unconstitutional on overbreadth grounds. On its face, Ordinance 583 regulates speech, if at all, because of its alleged effect on the economic feasibility of competing with the City's cable TV system. Thus, the ordinance would have the same deterrent effect for speech of parties not before the Court as it would on Warner. The plaintiff has identified no protected speech interests different from its own that would be chilled by the ordinance. Therefore, an overbreadth challenge is inappropriate. *See City Council of Los Angeles v. Taxpayers for Vincent*, *supra*, 466 U.S. at 802.

Accordingly, the defendant's motion for summary judgment on Count II of the complaint is hereby GRANTED, and this claim is DISMISSED, without prejudice.

(C) *Due Process.* In Count III of the complaint, Warner claims that the City will deprive it of due process of law in violation of the fourteenth amendment because the City has become both its competitor and regulator. The plaintiff points out that under the franchise agreement, the City has the power to make final decisions concerning Warner's rates and service. The plaintiff argues that since the City is also Warner's competitor, the City has a pecuniary interest in decisions concerning its franchise, so that the City Council cannot sit as an impartial tribunal. *See In re Muchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1684, 36 L.Ed.2d 488 (1973). In response, the City argues that no due process claim exists where a governmental entity both regulates and competes with its franchisee. *See, e.g., City of Pittsburgh v. Alco Parking Co.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974); *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1934); *Skaneateles Water Works Co. v. Skaneateles*, 184 U.S. 354, 22 S.Ct. 400, 46 L.Ed. 585 (1902).

This claim contains a fundamental problem. The constitutional right of a certain procedure under the due process clause does not exist in a vacuum. It depends on the presence of a specific liberty or property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). And, due process is a variable concept, which requires that the procedure accord with the interests that are threatened. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Specifically, an independent adjudicatory body is not always required to satisfy due process. *See, e.g., Holley v. Seminole County School District*, 755 F.2d 1492, 1497-98 (11th Cir. 1985).

Accordingly, in order for the plaintiff to substantiate its claim in Count III, it must also point to a property interest that will be threatened at a hearing before the City Council, and it must show that in this context it is entitled to an independent adjudicator. The record indicates that Warner is likely to seek rate adjustments and modifications concerning service areas under the franchise agreement, and that the City Council does possess some pecuniary interest in these decisions. Neither party has attempted to address the factual issues which would resolve this claim. Genuine issues of material fact remain. Therefore, the motion for summary judgment on Count III is hereby DENIED.

(D) *Cable Communications Act.* Under Count IV of the complaint, the plaintiff seeks to enjoin enforcement of the revenue bond ordinance because it allows the city to violate Title 47, *United States Code*, Section 533(e). Under Section 533(e)(1), a franchising authority is empowered to hold "any ownership interest in any cable system." However, the franchising authority is forbidden from exercising editorial control over the content of any cable service in which it owns an interest. 47 *U.S.C.* § 533(e)(2). Such editorial control must be exercised through an entity separate from the franchising authority. *Id.*

At the time Warner filed this suit in November of 1985, the City had not established an independent editorial board for its proposed cable system. The bond ordinance was enacted on October 16, 1985. During the next year, the City Council discussed what networks should be carried as part of the proposed system. The City, through its cable TV consultant and City Manager, negotiated and signed affiliate agreements with several commercial networks. On December 9, 1986, the City Council passed Ordinance 609, which established a programming board for the City's cable TV system. By making decisions concerning what commercial networks would have access to the City's system and how the proposed channel array would be used, the City has arguably made editorial decisions affecting the "speech" of the City's cable TV system.

However, it is not necessary to determine whether the City has violated 533(e), because I find that Count IV of the complaint is now moot. An action that is moot does not present a justiciable case or controversy under Article III of the Constitution. *See Kremens v. Bartley*, 431 U.S. 119, 127-28, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40, 57 S.Ct. 461, 81 L.Ed. 617 (1937). The enactment of a statute which remedies the principle attacked in an action moots that claim. *See, e.g., Kremens v. Bartley, supra*, 431 U.S. at 128-29; *Church of Scientology Flag Service Org. v. City of Clearwater*, 777 F.2d 598, 604-06 (11th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986); *Johnson v. State*, 586 F.2d 387 (5th Cir. 1979).

Ordinance 609 establishes a programming control board separate from the franchising authority. The plaintiff has not attacked the method by which the City established this board. The ordinance thus satisfies the aspect of Count IV which challenged the deficiency in Ordinance 583 of not setting up an independent editorial control board. For that reason, Count IV is moot.

Even if I assume that some injury occurred by the fact. that the City made editorial decisions prior to the enactment of Ordinance 609, it does not appear that Warner has standing to complain of that specific injury. In order to have standing, the plaintiff must allege a personal stake in the outcome of the case. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Article III establishes three minimum requirements for a plaintiff to have standing. First, the plaintiff must show that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Second, he must show that the injury is fairly traceable to the challenged action. *Id.* And, finally, he must show that the injury is likely to be redressed by a favorable decision. *Id.*; *see also Simon v. Eastern Kentucky Wel-*

fare Rights Org., 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

Several prudential considerations have been recognized in determining whether a plaintiff has standing to bring an action. *See Valley Forge Christian College*, *supra*, 454 U.S. at 474-75. One of these is that the plaintiff's complaint fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*; *see also Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

Warner has alleged no specific injury to itself in Count IV, and it does not appear to have suffered any injury as a result of this action of the City. The legislative purpose of Section 533(e) is "to preclude undue government control of programming contrary to the First Amendment." H. Rep. No. 98-934, 98th Cong., 2d Sess. 58, reprinted in 1984 U.S. Code Cong. & Ad. News 4655, 4695. The interests Congress sought to protect by enacting Section 533(e) were those speech interests protected by the first amendment which would be violated if a governmental entity exercised editorial control over the speech of a cable franchise.

Although in Count I Warner asserted that its first amendment rights would be injured by competition from the City's cable TV system, it has not indicated how its right to speak will be affected or has been injured by the alleged editorial decisions of the City. Warner's editorial control over its own speech has not been limited or regulated by the editorial decisions of the City Council.

The persons who may have been injured by the City's actions are those whose right to receive information over the City's cable system has been limited by the editorial discretion of the City, and those whose right to speak over the City's cable system has been limited by the restrictions on access engendered by the City's decisions. Warner, however, has not identified any injury it suffered as a result of this conduct of the City, and I cannot find that it would benefit from a declaration that the actions of the City complained of in Count IV were unlawful.

Accordingly, the defendant's motion for summary judgment on Count IV is hereby GRANTED, and the claim is DISMISSED, without prejudice.

The plaintiff also claims in Count IV and in its motion for partial summary judgment that the City Council cannot lawfully establish an editorial programming board, and, therefore, cannot own an interest in a cable TV system. Section 533(e) requires that the City yield all control over programming for a municipally-owned cable system to a separate, independent entity in order to comply with the restrictions of the first amendment. Plaintiff argues that establishing such an independent agency for editorial control is impossible under the Florida Constitution.

The source of plaintiff's argument is the unlawful delegation doctrine embodied in Article II, Section 3, of the Constitution of the State of Florida:

> The powers of state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

This section has been interpreted to preclude an elected governing body from delegating its legislative authority to an agency or person without defining "the limits of the power by including in the enactment reasonable standards which enable the affected public to meet the requirements of the enactment. These standards at the same time preclude the exercise of arbitrary power by the enforcement agencies of the government." *Smith v. Portante*, 212 So.2d 298, 299 (Fla. 1968) (quoting *Barrow v. Holland*, 125 So.2d 749, 752 (Fla. 1960)); *see In re Advisory Opinion to the Governor*, 509 So.2d 292, 311-12 (Fla. 1987); *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978). The unlawful delegation doctrine applies to municipalities which delegate their authority to city agencies. *See, e.g., City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801 (Fla. 1972).

Warner argues that the City cannot provide guidelines to the editorial programming board established by Ordinance

609 sufficient to comply with the Florida Constitution and at the same time remain in compliance with the federal constitution and statute. Thus, according to the plaintiff, the Florida Constitution dictates a result in direct conflict with the United States Constitution and a law enacted thereunder. I find that the plaintiff's argument must fail.

First, to the extent the Florida Constitution requires a result in direct conflict with the United States Constitution and a valid federal law, the supremacy clause controls. *E.g.*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 406, 4 L.Ed. 579 (1819); *Hamm v. City of Rock Hill*, 379 U.S. 306, 311-12, 85 S.Ct. 384, 13 L.Ed.2d 300 (1964); *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2, U.S. Const.

Second, Ordinance 609 does not appear to me to violate the unlawful delegation doctrine of the Florida Constitution. That doctrine is invoked when a legislative body delegates its own legislative authority. *See, e.g., Askew v. Cross Key Waterways, supra*, 372 So.2d at 913; *City of Miami Beach v. Fleetwood Hotel, Inc., supra*, 261 So.2d at 801. It is apparent from Section 533(e) that the City does not have the authority to control the programming for its own cable system. It cannot delegate power which it does not have. Section 533(e), however, does require the City to establish an independent programming board. By enacting Ordinance 609, the City has complied with the federal statute, and it has not violated the Florida Constitution.

Finally, while a legislative body under Article II, Section 3, of the Florida Constitution "may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law[,] . . . it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforce-

ment of the law within its expressed general purpose." *Florida State Board of Architecture v. Wasserman*, 377 So.2d 653, 655 (Fla. 1979). The authority of administrative officials to make such rules and regulations is not among the powers implicated by Article II, Section 3. Such incidental administrative authority is necessary for the agency to carry out the legislative plan. *Id.*

By Ordinance 583, the City recognized that ownership of a cable TV system was a municipal purpose of the City of Niceville, and it embarked on a program to operate such a system. As it cannot operate such a system without an independent programming board, Ordinance 609 makes it possible for the City to carry out the expressed public purpose of Ordinance 583. The authority exercised by the members of the board is incidental to the legislative decision to operate a cable TV system. Thus, even if the delegation doctrine is applicable in this context, Ordinance 609 does not violate it.

Accordingly, the plaintiff's cross motion for partial summary judgment on Count IV is hereby DENIED.

(E) *Municipal purpose.* In Count V of its complaint, the plaintiff asserts that operation of a cable TV system is not a "municipal purpose" and, therefore, Ordinance 583 is unauthorized under Florida's Constitution and law. Article VIII, Section 2(b), of the Florida Constitution grants municipalities the authority to exercise their "governmental, corporate, and proprietary" powers for "municipal purposes." Art. VIII, § 2(b), *Fla. Const.*; *see also* § 166.021(a), *Fla. Stat.* (1987).

I need not address the various arguments presented by the parties on this point, for the City could not grant a franchise for a CATV system unless it could provide that service itself as a municipal purpose. *Miami Beach Airline Service, Inc. v. Crandon*, 159 Fla. 504, 32 So.2d 153 (1947); *State ex rel. Buford v. Pinellas County Power Co.*, 87 Fla. 243, 100 So. 504 (1924); *Southern Utilities Co. v. Palatka*, 86 Fla. 583, 99 So. 236 (1924), *aff'd* 268 U.S. 232, 455 S.Ct. 488, 69 L.Ed. 930 (1925); *St. Joe Natural Gas Co. v. City of Ward Ridge*, 265 So.2d 714 (1st DCA 1972), *cert. denied*, 272 So.2d 816 (Fla. 1973). It naturally follows that plaintiff's argument is

not well founded. Accordingly, defendants' motion for summary judgment on Count V is GRANTED and this claim is DISMISSED.

(F) *Count VI.* Count VI of the complaint does not state a cause of action. It is hereby DISMISSED.

(G) *Legislative immunity.* In its motion for summary judgment, the defendant claims that the individual defendants as City Council members are entitled to legislative immunity. After this motion was filed, the plaintiff and defendants entered into a stipulation to dismiss all the individual defendants, which I granted. (Docs. 170,173) Accordingly, the defendants' motion for summary judgment concerning the immunity of the individual defendants is DENIED as moot.

DONE AND ORDERED this 11th day of April, 1988.

/s/ ROGER VINSON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Filed November 16, 1990

No. 89-3273

WARNER CABLE COMMUNICATIONS, INC.,
an Illinois corporation,

Plaintiff-Appellant,

—versus—

CITY OF NICEVILLE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 12, 1990, 11th Cir.,
19__, ____ F.2d ____).

Before:

TJOFLAT, *Chief Judge*,
TUTTLE, and RONEY*, *Senior Circuit Judges*.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) are Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
United States Circuit Judge

* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

ORDINANCE NO. 438

AN ORDINANCE GRANTING A FRANCHISE TO WARNER CABLE CORP., A CORPORATION, ITS SUCCESSORS, AND ASSIGNS, TO BUILD, CONSTRUCT, ERECT, OPERATE AND MAINTAIN A CABLE TELEVISION SYSTEM AND ASSOCIATED TRANSMISSION AND DISTRIBUTION FACILITIES THEREOF, IN, OVER, ALONG, ACROSS AND UPON THE STREETS, LANES, AVENUES, ALLEYS, BRIDGES, HIGHWAYS AND OTHER PUBLIC PLACES IN THE CITY OF NICEVILLE, FLORIDA, AND SETTING FORTH THE TERMS AND CONDITIONS ACCOMPANYING THE GRANTING OF THIS FRANCHISE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NICEVILLE, FLORIDA, That

SECTION 1

This Ordinance shall be known and may be cited as the Cable Television Franchise Ordinance of 1979. The City of Niceville shall hereafter be referred to as the "City" and Warner Cable Corp. shall hereafter be referred to as "Grantee".

SECTION 2

Subject to the terms and conditions hereinafter set forth the City hereby grants to the Grantee a private franchise with the right and privilege to construct, erect, use, operate and maintain, in, upon, along, across, over or under the streets, alleys easements, public ways and public places now established, laid out, or dedicated and all extensions thereof and additions thereto, in the City, poles, wires, cables, underground conduits, manholes and other conductors and fixtures necessary for the installation, maintenance and operation of a

cable television system for the transmitting of television signals and other signals either separately or upon or in conjunction with any public utility maintaining the same in the City with all of the necessary and desirable appliances and appurtenances pertaining thereto. Without limiting the generality of the foregoing, this franchise and grant shall and does hereby include the right in, over, under and upon the streets, sidewalks, alleys, easements and public grounds and places in the City to install, erect, operate, use or in any way acquire the use of as by leasing or licensing, poles, all lines, and equipment necessary to a cable television system and the right to make connections to subscribers and the right to repair, replace, enlarge and extend said lines, equipment and connections. Nothing herein shall be construed or constructed as in any way limiting or confining the operation of the cable television system contemplated hereby from being expanded by the Grantee as to provide cable television service to adjacent unincorporated areas of the county or to adjacent or contiguous municipalities or communities. In the event that additional poles need be erected, they will be erected in such manner and at such places as approved and specified by the City.

SECTION 3

(A) The City shall, in no way, be liable or responsible for any accident or damages that may occur in the construction, operation or maintenance by the Grantee of its facilities hereunder, and the Grantee does agree hereby to indemnify the City and hold it harmless against any and all liability, loss, cost, damage or expense, which may occur to the City by reason of the neglect or default of the Grantee in the construction, operation or maintenance of its facilities hereunder. The Grantee shall be solely responsible for determining widths of right of way on City streets and alleys. For the purpose of complying with the above, the Grantee shall carry property damage and public liability insurance in some responsible

insurance company or companies qualified to do business in the State of Florida, in the following amounts:

(1) Property damage, $50,000.00 as to one accident.

(2) Liability due to injury or death of person—$300,000.00 as to any one person and $500,000.00 as to any one accident. In each of these policies the City shall be named as an insured and a copy of each policy or a certificate of insurance shall be delivered to an retained by the City. The Grantee shall show evidence of advance payment on the aforesaid insurance policies and failure to do so may constitute a breach of the Grantee's duties hereunder.

(B) The City shall notify the Grantee within thirty (30) days after the presentation of any claim or demand, either by suit or otherwise, made against the City on account of any negligence as aforesaid on the part of the Grantee.

SECTION 4

The Grantee shall maintain a business officer within the City for the purpose of receiving inquiries or complaints from its customers. Grantee's business office shall be sufficiently and adequately staffed and maintained in a manner so as to meet the needs of its customers, either in person or by telephone, in a reasonably prompt and efficient manner. The Grantee shall in good faith attempt to investigate all reasonable complaints within 24 hours of their receipt and shall in good faith attempt to resolve them within 48 hours of receipt, and agents of Grantee will be available in the City for these purposes. Records of all customer complaints regarding Grantee's services, including their resolution or disposition, shall be maintained by Grantee for a period of twelve (12) months and shall be furnished to the City monthly. The following City official shall be responsible for receiving and acting upon any unresolved subscriber complaints and shall have primary responsibility for the continuing implementation of the complaint procedures and administration thereof: *The City Manager of the City of*

Niceville or his designee. Notice of the procedures for reporting and resolving complaints will be given by Grantee to each new subscriber at the time of initial regular subscription to the cable system. Annually upon reasonable notice to the Grantee, the City Council may agenda for discussion and appearance by the Grantee for purpose of briefing the City Council on the system's status of operation and future plans and to discuss any complaints with may have been registered with the City Council.

SECTION 5

(A) All structures, lines and equipment erected by the Grantee within the City shall be so located as to cause minimum interference with the proper use of streets, alleys, easements and other public ways and places and to cause minimum interference with the rights or reasonable convenience of property owners, and the Grantee shall comply with all reasonable, proper and lawful ordinances of the City in this regard now or hereafter in force and not in conflict herewith. Construction and maintenance of the transmission distribution system, including housing connections, shall be in accordance with the provisions of the National Electrical Safety Code prepared by the National Bureau of Standards, the National Electrical Safety Code and the National Board of Fire Underwriters as are in existence on the effective date of this ordinance and such applicable and reasonable ordinances and regulations of the City of Niceville, Florida, affecting electrical installations not in conflict herewith which may be presently in effect or may be enacted by the City Council of the City of Niceville, Florida. Existing poles, posts and other such structures of the electrical power system of the City or of any telephone company or other public utility shall be made available to the Grantee for leasing or licensing at reasonable terms and shall be used to the extent practicable in order to minimize interference with travel or the public convenience. The City shall assist the Grantee to

the extent practicable in obtaining joint pole use agreements from the owners of existing poles.

(B) In case of any disturbance of pavement, sidewalk, driveway, other surfacing or other public property the Grantee shall, at its own cost and expense and in a manner approved by the City, promptly replace and restore all paving, sidewalk, driveway or surface so disturbed in as good condition as before said work was commenced to the reasonable satisfaction of the City. It is further provided that if such repairs are not promptly made by the Grantee the City, at its option and after reasonable notice to Grantee, may make such repairs as it may deem necessary for which it shall be reimbursed by Grantee.

(C) In the event that at any time during the period of this franchise the City shall lawfully elect to alter or change any street, alley, easement or other public way requiring the relocation of the facilities of the Grantee, then in such event the Grantee, upon reasonable notice by the City, shall remove, relay and relocate the same at its own expense; provided, however, where public funds other than the City's are available for such relocation pursuant to law, then in that event the Grantee shall not be required to pay the cost.

(D) The Grantee shall on the request of any person holding a building moving permit issued by the City, temporarily raise or lower its lines to permit the moving of the buildings. The expense of such temporary removal shall be paid by the person requesting the same, and the Grantee shall have the authority to require such payment in advance.

(E) The Grantee shall have reasonable authority to trim trees upon and overhanging all streets, alleys, easements, sidewalks and public places of the City so as to prevent the branches of such trees from coming into contact with the facilities of the Grantee.

(F) All poles, lines, structures and other facilities of the Grantee in, on, over and under the streets, sidewalks, alleys easements and public grounds or places of the City shall be

kept by the Grantee at all times in a safe and substantial condition.

SECTION 6

The rates for installation of equipment and for basic subscriber services shall be as set forth below:

(A) *Residential Subscribers*

Initial Installation (through outside wall only)	*$20.00*
Monthly Service charge (first outlet)	*7.50*
Installation of each additional outlet	*7.50*
Monthly Service each additional outlet	*1.50*
Reconnect Fee (if service suspended)	*7.50*
Reactivate Existing Drop	*7.50*
Relocate outlet	*7.50*
House Move	*Cost plus 10%*

An additional charge may be added to the applicable rates when a subscriber elects to subscribe to "pay" TV or other optional services in addition to the basic service, when offered and available.

Provided, however, nothing contained herein shall operate or be construed to prohibit or prevent the Grantee, at its sole option, from lowering the above stated rates from time to time for special promotions, for specified periods of time, during the term hereof.

(B) *Commercial Subscribers*

To be negotiated on an individual basis.

An additional charge may be added to the applicable rates when a subscriber elects to subscribe to "pay" TV services in addition to the basic service, when offered and available.

(C) *Public Buildings*

The Grantee shall provide at no charge installation and service to public buildings within the City, to include the police station, fire station, city hall, and city library.

(D) No increase in rates charged for installation of equipment for basic subscriber services, and for basic monthly subscriber services, as specified in the preceding paragraphs shall be made effective except as authorized and approved by the City Council within forty-five (45) days after formal notice to the City of such increase by Grantee and after a full, open and public proceeding upon prior notice affording due process and opportunity of all interested parties to be heard, except that in the event that the City Council fails to approve or disapprove the rate increase within the 45-day period, such increase shall be effective at the end of the 45-day notice period. Provided, however, nothing herein shall prohibit the City from enacting by Ordinance a utility tax to be paid by each subscriber to the Grantee's cable television system within the City limits, should state law permit the same during the term hereof.

(E) Rates for services other than installation of equipment for basic service and for regular subscriber services shall be established by the Grantee pursuant to any applicable rules of the Federal Communications Commission.

(F) In the event that service to a subscriber is interrupted for reasons within Grantee's reasonable control for a continuous period of 24 hours or longer, the monthly cable rate shall be prorated for such subscribers for such period that the service is terminated.

SECTION 7

The Grantee shall equitably and reasonably extend energized trunk cable to all areas within the limits of the City within 120 days of a request by a subscriber, not already served, provided, however, in the event any subscriber is in a remote or inaccessible location, the Grantee shall have the right to charge such subscriber for material and labor expended by Grantee in providing such service connection, in excess of the cost of extending service generally to subscribers without charge to them. The City Council will make the final

determination of whether or not a subscriber is in a remote or inaccessible location and liable for line extension charges, and such determination of whether or not a subscriber is in a remote or inaccessible location and liable for line extension charges shall be final and binding upon the Grantee.

SECTION 8

The franchise is governed by and subject to all applicable rules and regulations of the Federal Communications Commission, specifically including Part 76 and by the laws of the State of Florida. Should there by any modifications of the provisions of Section 76.31 of the Rules and Regulations of the Federal Communications Commission resulting from amendment by the FCC which must be incorporated into this franchise, the City and the Grantee agree that such incorporation shall be accomplished within one (1) year after the effective date of the FCC's adoption of the modification, or upon renewal of this franchise, whichever occurs first. However, the right is hereby reserved to the City to adopt, in addition to the provisions herein contained and existing applicable ordinances, such additional ordinances as it shall find necessary in the exercise of its police power, provided that such regulations shall be reasonable and not in conflict with the terms hereof, the laws of the State of Florida, the laws of the United States of America, or the rules of the Federal Communications Commission. If any section hereof is determined to be illegal or inconsistent with any Federal or state law, all other portions of this ordinance and franchise shall remain valid, and the inconsistent provisions shall be deemed invalid, so that the ordinance and franchise shall continue in full force and effect. To the extent that the ordinance and franchise must have additional clauses added so as to be consistent with Federal or state law, such clauses shall be added as expeditiously as reasonably possible after consultation between the City and Grantee and shall be reasonable and, to the extent possible, not inconsistent with the terms hereof.

SECTION 9

The term of this franchise shall be for a period of fifteen (15) years commencing _____, 19____, and continuing for a total of fifteen (15) years thereafter.

SECTION 10

During the term hereof Grantee shall substantially meet the material technical requirements as required by the FCC for the Niceville system under its technical standards, as they may be amended from time to time. The City shall have the right, to be exercised no more frequently than one time each year, to engage a third party to objectively examine Grantee's technical data collected by the City's TV Consultant and the Grantee under the FCC's technical standards and under Grantee's technical testing procedures and/or to objectively conduct tests of his own pursuant to the FCC's and Grantee's technical procedures. The third party will be a neutral party who is recognized for his experience in cable television technical matters, and his selection will be mutually agreed upon by Grantee. The costs of the third party advisor, which shall be reasonable and substantiated, shall be borne equally by the City and the Grantee. Any report by the third party as to Grantee's conformity with the FCC's technical standards shall be in the form of a written certification containing only findings of fact that the Niceville system has or has not met such FCC technical standards on the dates of testing. If the certification states that the system is not in compliance with the FCC's technical standards, the third party shall objectively specify in detail each failure to comply. Any such certification shall be delivered in writing to Grantee, return receipt requested, at the same time it is delivered to the City. The Grantee shall have fifteen (15) regular business days after receipt of the certification in which to discuss and attempt to resolve with the third party and the City any disagreement which it may have with the neutral third party's findings of fact or methods of reaching them. If the system is, in fact,

not in compliance with the FCC's technical standards, Grantee shall then have sixty (60) regular business days from the expiration of said fifteen (15) business-day period in which to rectify, or make a reasonable attempt in view of the time limitations to rectify, the failure to comply. The City, Grantee, and the third party shall all give reasonable cooperation to one another so as to enable Grantee to meet said test. At the end of the said sixty (60) business-day period or at such earlier times as Grantee states that the failure has been corrected, the neutral third party may, only as pertains to the earlier found failure, objectively examine Grantee's technical data collected under the FCC's and Grantee's technical testing procedures and/or objectively conduct tests of his own pursuant to the FCC's and Grantee's technical testing procedures. Any report by the third party as to Grantee's conformity with the FCC's technical standards regarding the earlier found failure shall be in the form of a written certification containing only findings of fact that the Niceville system has or has not met such FCC technical standards on the date of testing. If the third party's certification states that the system is not in compliance with such FCC technical standards (regarding the earlier found failure), the third party shall objectively specify in detail each failure to comply. Any such certification shall be delivered in writing to Grantee, return receipt requested, at the same time it is delivered to the City. If the earlier found failure has not been corrected and if a reasonable attempt in view of the time limitations to correct it has not been made within the sixty (60) business-day period, with the result that the standard set forth in the first sentence of this paragraph is not met, after due process proceedings. the City shall have the right at its discretion to revoke the franchise, provided, however, that the City has met all of its obligations hereunder, and provided further that if any such revocation action is to be taken it shall be taken within, and no later than, thirty (30) regular business days after termination of the sixty (60) day period.

In addition to the foregoing, if the Grantee should substantially violate any of the material terms, conditions or provisions of this franchise, or if the Grantee should substantially

fail to comply with any reasonable and material provisions of any ordinance of the City not in conflict herewith regulating the use by the Grantee of the streets, alleys, easements or public ways of the City, and should the Grantee continue to violate and fail to take reasonable action to rectify the same within a period of sixty (60) days after the Grantee shall have been notified in writing by the City to desist from such violation so specified, then the Grantee shall be deemed to have forfeited and annulled, and shall thereby forfeit and annul, all the rights and privileges granted by this franchise, provided that such forfeiture shall be declared by a court of competent jurisdiction after hearing and upon appropriate full and final findings as prescribed by law.

It is understood that due to failure arising from the aging of the system and/or the particular corrosive atmospheric environment in the City and arising outside Grantee's normal technical operations and maintenance of the system; that due to possible changes during the term hereof in technology; that due to circumstances beyond Grantee's control (such as, without limitation, acts of God, lack of cooperation from local utility companies and governmental departments, strikes, and tardy equipment deliveries); and that due to possible changes in the federal, state, and/or local laws, Grantee may be unable to complete any necessary corrective action within the designated time periods specified in this ordinance. In any such event, revocation action will not be taken, and Grantee must give notice thereof to the City and must make a reasonable, good faith attempt to rectify any failure, in view of the circumstances, as expeditiously as is reasonably possible.

The City may engage the services of a City TV Consultant, agreeable to both the City and the Grantee, at any time during the term of the franchise for the purpose of collecting the data referred to in this Section of this ordinance and the reasonable and customary fees and expenses of such TV Consultant shall be paid by the Grantee; provided, however, such sum payable by the Grantee shall not exceed $2,500.00 per year.

SECTION 11

The Grantee may surrender this franchise at any time upon filing with the City Clerk of the City a written notice of its intention to do so at least eighteen (18) months before the surrender date. On the surrender date specified in the notice, and provided that all of Grantee's obligations, duties and liabilities under this Ordinance have been fulfilled and finally discharged, all of the rights and privileges and all of the obligations, duties and liabilities of the Grantee shall terminate.

SECTION 12

All of the rights and privileges and all of the obligations, duties and liabilities created by this franchise shall pass to and be binding upon the successors or assigns of the City and the successor and assigns of the Grantee, and the same shall not be assigned or transferred without the written approval of the City Council, which approval will not be unreasonably withheld; provided, however, that this section shall not prevent the assignment of the franchise by the Grantee as security for debt without such approval and provided further that if no final action by the City on any application is taken within forty-five (45) days after application is tendered, the application shall be deemed granted.

SECTION 13

In consideration of the terms of this franchise, the Grantee agrees to pay to the City a sum of money equal to five percent (5%) of the Grantee's gross subscriber revenues per year. Such annual sums shall be payable in four (4) quarterly payments being at the end of each quarter, namely: March 31, June 30, September 30 and December 31. Each quarterly payment shall be paid within sixty (60) days after the end of the quarter. In respect to this provision, the City and Grantee hereby acknowledge and agree that incorporated into the consideration herein provided is compensation to the City for its

services and expenses in continually monitoring and evaluating the standard of performance of Grantee for the benefit of the public, and the City's services and expenses in implementing and cooperating in and with the complaint procedures set forth herein.

Provided however, that during the term hereof should Grantee hereafter pay a rate of compensation for a cable television system franchise in Okaloosa County, Florida, which is greater than the rate provided for herein, the rate of compensation, on the basis of percentage only, shall be readjusted to that greater rate to be effective commencing, and corresponding with the annual compensation period next arising under the terms hereof following the effective date of Grantee's agreement to compensate the other Okaloosa County, Florida, franchisor(s) at a rate greater than five percent (5%).

The Grantee shall keep complete records of account showing dates and payments received. The duly authorized agent appointed by the City shall have the right, power and authority, at the expense of the City, to inspect and audit the current records of gross revenue of the Grantee at any reasonable time. The gross revenue records of the Grantee for any annual period shall be closed to the City after three (3) years from the said annual anniversary or after an audit of such records has been made.

Nothing herein shall be construed as requiring the Grantee to pay the City any portion of the revenue derived from the sale of cable television service by the Grantee to customers residing outside of the corporate limits of the City. However, upon the annexation to the City of any territory not now within the corporate limits of the City, the portion of the Grantee's facilities that may be located within such annexed territory and upon the streets, alleys or public ground or places thereof, shall thereafter be subject to all the terms of this franchise as though it were an extension made thereunder.

SECTION 14

This Ordinance when accepted by the Grantee shall be and become a valid and binding contract between the City and the Grantee, but this Ordinance shall be void unless the Grantee shall, within thirty (30) days after the final passage of this Ordinance, file with the City Clerk of the City a written acceptance of this Ordinance and the franchise herein granted.

SECTION 15

At the expiration of the term of this franchise, the City shall have the right to purchase, at fair market value, all of the physical properties and assets of the Grantee used under the term of this franchise; such fair market value to be determined by the report of the majority of three (3) arbitrators, one (1) to be selected by the City Council, one (1) by the Grantee, and the third by the arbitrators so selected, provided however, should the Grantee refuse for thirty (30) days to select the arbitrator, then a Judge of the Court of competent jurisdiction over such a case shall be authorized to appoint the third arbitrator; and upon expiration of the term of this franchise the City shall have the right to negotiate a new franchise with Grantee, or negotiate a new franchise with a different person, company or corporation, or renew this franchise agreement with Grantee, whichever the City in its sole discretion and exclusive judgement shall elect.

SECTION 16

Whenever in this Ordinance either the City of Niceville or the Grantee corporation is named or referred to, it shall be deemed to include the respective successor, successors or assigns of either, and all rights, privileges and obligations herein conferred shall bind and inure to the benefit of said successor, successors or assigns of said City or of the Grantee.

SECTION 17

Any notices required or provided for herein shall be valid and deemed as given if made in writing and posted in the United States mails via First Class Registered Mail, Return Receipt Requested, in the following manner:

If to City:

City of Niceville
101 Armstrong Avenue
Niceville, Florida 32578

If to Grantee:

General Manager
Warner Cable Corp. of Niceville
Palm Plaza
Niceville, Florida 32578

with copies to:

Senior Vice President and General Counsel
Warner Cable Corporation
75 Rockefeller Plaza
New York, New York 10019

and

Vice-President and Regional Manager
Warner Cable Corporation
3485 Desert Drive
Suite 204
Atlanta, Georgia 30344

SECTION 18

If any section, sub-section, sentence, clause, phrase or portion of this agreement, or any resolution authorizing or approving this agreement, is for any reason held invalid or unconstitutional, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portion hereof.

SECTION 19

This franchise shall be non-exclusive.

SECTION 20

After publication of this Ordinance in its entirety once each week for four successive weeks in the Playground Daily News, a newspaper of general circulation in Okaloosa County, Florida, this Ordinance and the contract and agreements embodied herein shall become effective on March 17, 1980.

ADOPTED in regular session this 12th day of February, A.D. 1980.

CITY OF NICEVILLE

/s/ RANDALL WISE
MAYOR

ATTEST:

/s/ GEORGE H. IRELAND
CITY CLERK

ORDINANCE NO. 583

AN ORDINANCE OF THE CITY OF NICEVILLE, FLORIDA, PROVIDING FOR THE ISSUANCE OF NOT EXCEEDING $2,000,000 CABLE TELEVISION REVENUE BONDS, SERIES 1985, OF THE CITY TO BE APPLIED TO PAY THE COST OF ACQUIRING AND CONSTRUCTING A CABLE TELEVISION SYSTEM TO BE OWNED AND OPERATED BY THE CITY; PROVIDING FOR THE PAYMENT OF THE 1985 BONDS FROM THE NET REVENUES OF THE SYSTEM AND THE EXCISE TAXES DESCRIBED HEREIN, INCLUDING COVENANTS AND AGREEMENTS IN CONNECTION THEREWITH; PROVIDING FOR THE SEVERABILITY OF THE PROVISIONS HEREOF; AND PROVIDING AN EFFECTIVE DATE

* * *

Section 2. Definitions

* * *

"Excise Taxes" shall mean the Sales Tax Revenues and the Revenue Sharing Funds.

* * *

"Revenue Sharing Funds" shall mean the guaranteed entitlement portion of the revenue sharing trust funds of the State of Florida as defined in and distributable to the Issuer pursuant to Chapter 218, Florida Statutes.

"Sales Tax Revenues" shall mean the proceeds of the local government half-cent sales tax, as defined and described in, and distributed to the issuer under, Part VI, Chapter 218, Florida Statutes.

"Serial Bonds" shall mean any Bonds for the payment of the principal of which, at the maturity thereof, no Amortization Installments are required to be made prior to the twelve-month period immediately preceding the stated date of maturity of such Serial Bonds.

* * *

Section 16. COVENANTS OF THE ISSUER. Until all principal of and interest on the Bonds shall have been paid or provided for as herein permitted, the Issuer covenants with the Bondholders as follows:

A. APPLICATION OF EXCISE TAXES. All of the proceeds of the Excise Taxes, as soon as the same are received by the Issuer, shall be deposited into a special fund which is hereby created and designated the "Excise Taxes Fund."

Whenever by reason of the insufficiency of Gross Revenues in the Revenue Fund, the Issuer is not able to make promptly the payments hereinafter required to be made into the Sinking Funds, the Bond Amortization Account and the Reserve Account, there shall be paid, into such Fund and Accounts, no later than on the 20th day of each month in each year, from the moneys on deposit in the Excise Taxes Fund, whatever sums are necessary to cure such existing deficit. Whenever all of the herein required current payments have been made into the Sinking Fund, the Bond Amortization Account, and Reserve Account, the balance of any moneys on deposit in the Excise Taxes Fund may be withdrawn on the 20th day of each month in each year and used by the issuer for any lawful purpose.

B. EXCISE TAXES COVENANTS. The Issuer has full power to irrevocably pledge the Excise Taxes to the payment of the principal of and interest on the Bonds, and the pledging of the Excise Taxes in the manner provided herein shall not be subject to repeal, modification or impairment by any subsequent resolution, ordinance or other proceedings of the issuer or by any subsequent act of the Legislature of Florida.

(2) The Issuer shall be obligated so long as any of the Bonds are outstanding and unpaid, to take all lawful action necessary or required to continue to entitle the Issuer to receive the Excise Taxes in such amounts and at such rates up to the maximum amounts or rates as are now or may hereafter be provided by law to provide Excise Taxes in each Fiscal Year sufficient to pay one hundred twenty-five per

centum (125%) of the Bond Service Requirement becoming due in such Fiscal Year and one hundred per centum (100%) of all Reserve Account deposits required to be made in such Fiscal Year.

EXCERPTS FROM MINUTES OF NICEVILLE CITY COUNCIL

STATEMENT OF COUNCILMAN GARY A. BROWN, CHAIRMAN OF CABLE TELEVISION COMMITTEE

???. You don't think Warner will put a law [suit] against us?

BROWN: I don't think it'll have much merit. I think the law as it stands now basically, expressly says that if there is no competition in the area of the municipalities, then they provide that competition.

CORBIN: And the fact that you have a strong referendum behind you, would, uh . . .

BROWN: Nah, I'll say this, too, uh, there are no, there are no, there is not, there is not gonna' be a competitive system in Niceville.

(Minutes of Niceville City Council; Feb. 18, 1985)

STATEMENT BY THOMAS K. MILLER, CABLE CONSULTANT TO NICEVILLE

Miller: . . . Warner has about 3,400 customers here. Figuring you'd [the City system] get 75 percent of their customers—it's 75 percent of Warner's customers, which I don't think would be that hard to do. They have, uh, they have been here such a long time, they have uh, they have uh not too good of a rapport with this City at this time which is obvious because you're talking about cable right now. Get 75 percent of them 3,400 customers, you're looking at 2,565 customers and I think that's a realistic number to get. I think if the City, looking at the worst case scenario, if they try to compete—they try to rebuild, I believe because of them being here this long, their service being what it has been, uh, the position they put themselves in without anybody's help, I believe that uh, if they did exactly what Niceville did, we'd, we'd of stood the possibility of getting 75 percent of their customers. And the next thing is, is if Niceville were to rebuild before they were, I don't see that they're gonna' rebuild. I see 'em rebuilding Bluewater Bay, but not, not the people we're looking at.

(Minutes of Niceville City Council; June 10, 1985)

SELECTED PORTIONS OF THE RECORD BELOW

TESTIMONY OF GARY BROWN
MEMBER OF NICEVILLE CITY COUNCIL AND
CHAIRMAN OF CABLE TELEVISION COMMITTEE

Q. Do you recall the controversy or the objections concerning the Christian religious programming?

A. I recall the—some general comments about the time I—I don't know the specific comments.

Q. Well, what was your recollection about the reason that the Christian religious programming became a part or concern of the city council?

A. Well, I can go by what's here. I think as Mr. Corbin [City Manager of Niceville] said, he'd had a lot of—according to this, Mr. Corbin had a lot of concern expressed to him about the removal of that channel [Jim and Tammy Bakker's Inspirational Network].

Q. Did you become involved in investigating that, or were there any concerns with you about it?

A. I don't recall specific concerns. As it indicated here, I think we voted to ask Warner to consider leaving the channel.

(Sept. 9, 1986; Dep. Tr. 12-13).

* * *

Q. Do you consider Mr. Miller's provision in his feasibility study that the payment of the bidirectional system, or two-way system for monitoring traffic and lift stations be paid from the general revenues of the system as being not feasible?

A. I think not feasible is a little too harsh a word.

Q. How would you describe it?

A. I would say that before the system shakes out method of payments, and cross charges to departments within the City will also have to be worked out. Again, we have poured very little concrete or dug very few holes to date.

(Oct. 7, 1986; Dep. Tr. 116)

* * *

Q. Well, the bidirectional services that you intend to provide. If there's a shortfall in the revenues from those bidirectional services, how do you intend to make up for those?

A. If those bidirectional services were strictly—were strictly related to water, sewer, et cetera, then I assume that they would be handled in the same fashion as if we had a shortfall in the sewer department.

Q. And how is that?

A. That's to increase rates or cut down on expenses.

Q. Now, whose rates are you intending to increase on the bidirectional? Are you talking about rates for bidirectional services, or all subscribers rates?

A. I'm talking about if the system is there to monitor water and sewer, then I assume that those—again, this is in an assumption—I would assume that those losses would be made up because of that, or they could be amortized over the entire system. I think it's an academic question.

Q. Another aspect of the bidirectional, two-way system is the security system and its medical alert, or burglar alert. Has the City of Niceville—or the City Council or the City staff obtained any marketing studies showing the market for these services in the City of Niceville?

A. No. As far as I know, best to my knowledge, I don't know of any direct marketing study. I know we have a continuing expansion of the intrusion system that's currently in effect that's in the police station. In fact, I believe they had to cease taking new members here awhile back because they used up all the telephone company's telephone lines. They had no more pairs running through there, as I recall.
(*Id.* 120)

* * *

Q. Would you expect [a bidirectional system] to be a break-even service?

A. Perhaps not; perhaps not. I haven't looked at the cost of that service.

Q. If it was not at least a break-even service, would you include that in the City of Niceville cable TV system?

A. I would hope to include that eventually, because I believe it to be important.

Q. Even if it wasn't break-even?

A. Perhaps, yes.

Q. And if there was a shortfall or was a breakeven, how would payment for that—pursued payment for that system to be made or covered?

A. I think there are several possibilities of perhaps general fund or public welfare.

(*Id.* 122)

* * *

Q. The next sentence says "The City has flexibility in both financing and payback not available to most private operators." Please explain what you meant by that statement.

A. Well, I thought that was a clear statement I had in there. The City has flexibility in both the—well, the bonds, the revenue bond, we usually receive a favorable rate on. The city has a good record in that, and gets a good bond rate, and has a good rating. There was some talk at one time that perhaps we could finance it ourself from reserves if necessary.

We don't pay—we don't pay income tax. That's no big secret. We don't have to make a profit to keep the stockholders happy. Now, most companies have to make a profit, otherwise people get very upset. There are some of our companies that don't always do that. It wasn't intended that they be nonprofit, it just seems to work out that way sometimes. But that was all I meant there, not everybody could get revenue bonds for building a cable system.

(*Id.* 124-125)

* * *

THE COURT: Let me ask it again so there's no misunderstanding. If your city's cable operations do not operate as projected but instead operate for a considerable period of time at a considerable deficit so that you have to come in with supplementing funds and to do that you're going to

have to increase taxes, that's your only source of revenue otherwise, I suppose. Right?

THE WITNESS: We have other taxes pledged to the bond issue.

THE COURT: And you have to increase taxes and you've got a city hall full of angry people out there saying, "We don't want to have our taxes increased," and let just assume without getting specific that there is some way you can exercise your regulatory discretion, and in so doing either pick up additional revenue or customers or both, from your competitor [Warner Cable], so that you don't have to then increase the taxes. Isn't that going to be a difficult decision for you?

THE WITNESS: I think it would be about as difficult as answering this question, sir.

THE COURT: Well, I'm not trying to put you in a corner but such things happen. You have to acknowledge that.

THE WITNESS: I understand. I'm trying to think of how I could do that. Not if I could do it but how I could do it. And frankly, nothing comes to mind. I would have to fight for the system if that's what you asking. I hope I could fight legally and within the framework of the law.

THE COURT: Isn't it true that you have a lot of people who live in the City of Niceville who do not subscribe to cable TV?

THE WITNESS: No, sir, that is not true.

THE COURT: Everybody subscribes?

THE WITNESS: Not everybody, but I think probably 85 percent or more.

THE COURT: There are 15 percent then, assuming it's 85 percent, who certainly don't gain anything by having cable TV service at all?

THE WITNESS: I think some of those 15 percent will have cable service on the Niceville system. That's historically what I read happens.

THE COURT: Assuming it's only 10 percent or 5 percent, there is a certain percentage that will never take cable TV, can't afford it, right?

THE WITNESS: That's correct.

THE COURT: They may pay taxes, right?

THE WITNESS: Yes, sir. But we are providing other city services. Our plan is to provide other city services too on the cable system, some of which I think every citizen will benefit from, even those who are not subscribing to the Niceville system.

THE COURT: But from your very testimony you have indicated that you're in a difficult situation trying to regulate a competitor. You don't quarrel with that.

THE WITNESS: No, sir.

THE COURT: I've gathered that throughout your testimony. Isn't that true?

THE WITNESS: Yes, sir.

(May 16, 1986; Trial Tr. 45-47)

* * *

Q. All right, and during that council meeting [May 10, 1988] did you not say, "The big hammer of the franchise was originally the rate control; if you're controlling somebody's money you are controlling them"?

A. I believe I said something along that line, yes.

(*Id.* 156)

TESTIMONY OF JESSE ALMA EDGE
MEMBER OF NICEVILLE CITY COUNCIL

Q. What kind of programs were [the Niceville subscribers] saying they didn't get?

A. Some for the children, some Christian programs, and then at one time the weather went off. We couldn't get the weather for a good while on Warner Cable, and they took off several of the programs.

Q. Did you convey those complaints to other members of the Council?

A. Well, they all—each person called each Council, yes, they did. But as far as us coming together and expressing ourself and all, it was the people calling us.

Q. So when you talked to the Council about those situations, it was at a Council meeting. Is that what you're telling me?

A. Sure. Sure. The people come to us, we didn't discuss it at all only, and we didn't discuss it with each other, is what I meant, at the meetings and all.
(Oct. 1, 1986; Dep. Tr. 7-8)

* * *

Q. Did you ever hear complaints that Warner's making money and taking it out of Niceville and sending it to New York or someplace else?

A. I certainly have. Yes, I heard it.

Q. Did you ever hear complaints that people who live in Niceville, the decisions about what channels they get to watch, that those decisions are made by some guy over in Fort Walton, or some guy in New York City?

A. Yes, we haven't had no chance to get our own programs that we'd like. They've been changed, and changed and changed.
(Oct. 1, 1986; Dep. Tr. 44-45)

TESTIMONY OF LANNIE L. CORBIN
CITY MANAGER OF NICEVILLE

Q. Mr. Corbin, do you remember the situation dealing with the subject matter of Exhibit 91?

A. I think it refers to PTL as being removed from cable service.

Q. And PTL means "Praise the Lord," as I understand it. Is that the program?

A. Yes, sir.

Q. It is a religious network program. Is that your understanding of it?

A. It is religious, right.

Q. Now, did Warner—did you call Warner before this matter became an item on the agenda for the City of Niceville?

MR. WELLS: Do you mean him personally?

MR. MOORE: Yes, sir.

A. Probably did.

Q. And talked to their manager?

A. Uh-huh.

* * *

Q. Mr. Corbin, the City objected, the Council made objections to the move [of the Jim and Tammy Bakker PTL Network] from Warner. Is that your understanding?

A. Mr. Moore, I believe the Mayor wrote a letter to Warner Cable expressing their concern about moving it. How that relates to the franchise, I do not remember.

(Oct. 8, 1986; Dep. Tr. 38-39, 41-42)

* * *

Q. If I could direct your attention to what is Roman numeral III.

A. Okay.

Q. To the best of your recollection, by March 11, 1986, had the City executed 19 affiliate agreements?

A. To the best of my knowledge.

(Oct. 31, 1986; Dep. Tr. 5).

LETTER COSMIC COMMUNICATIONS TO NICEVILLE CITY MANAGER (EXHIBIT 132)

March 11, 1986

Mr. Lannie L. Corbin
City Manager
208 Partin Drive
Niceville, FL 32578

Re: System Update February 1986

Dear Lannie:

The following is a categorized report on the status of the cable system for the month of February 1986.

* * *

III. Program Affiliate Agreements

The City has received in 19 affiliate agreements.

* * *

Very truly yours,

/S/ Tom

Thomas K. Miller
President

TKM/ss

LETTER FROM PTL'S THE INSPIRATIONAL NETWORK TO NICEVILLE CITY MANAGER (Exhibit 118)

November 20, 1985

Mr. Lannie L. Corbin
City Manager
Niceville Cable Communications
208 Partin Drive
Niceville, FL 32578

Dear Mr. Corbin:

Thank you for the returned contract. Benefiting most from our relationship will be the subscribers in your respective franchises. These subscribers appreciate as a part of their total lifestyle a programming format which has a direct or underlying message of hope and faith. This is what PTL—The Inspirational Network offers.

Enclosed herewith is your copy of the contract duly countersigned. I look forward to a long and mutually beneficial relationship.

Kindest regards,

/S/ Jackie Bradley

Jackie S. Bradley
Senior Account Executive

JSB:pem
Enclosures

LETTER FROM COSMIC TO NICEVILLE CITY MANAGER (Exhibit 103)

November 5, 1985

Mr. Lannie L. Corbin
City Manager
City of Niceville
208 N. Partin Drive
Niceville, Florida 32578

Dear Mr. Corbin:

On November 1, 1985, Cosmic Communications, Inc., requested of all program suppliers an Affiliate Agreement Contract for their respective channel(s). The request was made by Cosmic on behalf of the City of Niceville.

Please find enclosed the draft that was used for the Satellite and Premium channel programmers.

Also, listed below are the Satellite and Premium Channel(s) the respective letters were sent to.

Satellite

Channel 17 WTBS
Cable News Network
Cable News Network (HN)
Nickelodeon
Arts and Entertainment
Financial News Network
Lifetime
Channel 9 WGN
USA Network
The Discovery Channel
Channel 9 WOR
ESPN
The Nashville Network
The Weather Channel
Black Entertainment Television
CBN
PTL
Video Hits 1
MTV
C-SPAN
Country Music Television
Satellite Programming Network

Premiums

HBO
Showtime
The Disney Channel
Cinemax
The Movie Channel

If you have any questions, please feel free to contact me at 678-3878.

Sincerely,

/S/ Cyndia A. Miller

Cyndia A. Miller
Vice President
Administrative Services

TESTIMONY OF THOMAS K. MILLER PRESIDENT, COSMIC COMMUNICATIONS CABLE CONSULTANT TO NICEVILLE

Q. Dealing with Exhibit No. 48 [Christian Broadcasting Network (CBN) Affiliate Agreement]. When it was received did you review that document prior to submitting it to the City for execution?

A. Did I?

Q. Yes, sir.

A. I don't recall reviewing this specific one.

Q. Did you know that the CBN cable affiliation agreement was an agreement for three years?

A. Most all the agreements are for a period of three years generally; some can be longer, but in general most of them are for three years. I think that was presented in our feasibility study under the expenses, but normally the agreements are signed for three years.

Q. Did you specifically discuss with Mr. Corbin [Niceville's City Manager] that the CBN agreement, that is, Exhibit No. 48, was a three-year agreement?

A. I didn't.

Q. Exhibit No. 49. Dealing with Exhibit No. 49, can you tell us generally what type of network PTL is?

A. That stands for Praise The Lord Network. It's basically a family inspirational network.

Q. Does it deal with the Christian religion, as opposed to some other type of religion?

A. I believe it represents primarily that faith. I'm not sure if they have other programming that might deal with other faiths.

(June 6, 1986; Dep. Tr. 60-61)

TESTIMONY OF WAYNE GOODSON
ASSISTANT CITY MANAGER OF NICEVILLE

Q. Now, let me see if I can trace some history of the events that occurred. Do you recall any instance involved in which a Christian religious program [Jim and Tammy Bakker's PTL Inspirational Network] became an issue before the City?

A. Yes, I do.

Q. What do you recall about it?

A. Well, I recall that a couple of religious channels were going to be terminated by Warner Cable, and also the Super Station, and there was a lot of public opposition to that in Niceville. Mayor Wise forwarded a letter at that time to Mr. Peden expressing the concern Niceville had about the programming changes.

(Oct. 3, 1986; Dep. Tr. 18)

* * *

Q. Yes, would a city system have a cost that would be less than say Warner's investment as a private industry?

A. We do not have to be concerned as much as private industry with making a profit. We need to be concerned about being able to replace the system after a 15-year period. We need to be concerned about having the operation and maintenance capability to service the system. But I think it's pretty well accepted that because we do not have sharehold-

ers, people who are interested in making money off of TV, that we can provide more for less as a municipal system. (*Id.* 39-40)

TESTIMONY OF WILLIAM C. FRAY, JR.
FINANCIAL ADVISOR TO CITY OF NICEVILLE

Q. In your capacity as the financial advisor, what did you see as your role in the preparation of the bond ordinance?

A. To provide a structure, security arrangements for the bond issue, flow of funds, and ways to secure the bond issue in such a way that the City could secure as advantageous an interest rate on the financing as possible.

Q. This is the information then that you furnished to Mr. Livermore?

A. To whom?

Q. Mr. Livermore—Dan Livermore?

A. He developed a good part of that, but we worked jointly to make sure that the financial part of it and the legal part of it are in concert.

Q. What I'm trying to find out is what your involvement was from the financial aspects. So can you—

A. We reviewed the document and found, with a few minor changes, that it was proper.

We wanted to have a document set up that provided the half-cent sales tax and the guaranteed entitlement portion of the state revenue sharing funds as security for the financing, knowing that that would reduce the cost of borrowing to the City.

(Sept. 30, 1986; Dep. Tr. 27-28).

* * *

Q. So what you were recommending is that the excess revenue above what it costs to operate be used—of the TV cable system—be used to pay off the debt. Is that what you're saying?

These two additional revenues are pledged to that bond. Is that what you are telling me?

A. I'm saying that regardless of feasibility, that second layer of security—we recommend that a second layer of security be added to this bond issue to help reduce the borrowing cost of financing this particular project.
(*Id.* at 60)

* * *

Q. Did you discuss with Mr. Miller the insertion in any of his reports of funds to buy land?

A. Did I discuss with Mr. Miller the use of some of the bond proceeds for the purchase of land?

Q. Yes, sir.

A. Not to my knowledge.

And what was included in the cost of construction—there might have been some numbers included in the $1,550,000, if that's the right number—I believe it is—land may have been included in that. But as a separate item and as a separate point of discussion, I don't recall that.

Q. What impact on the feasibility of the bond would a $1.2 million error have?

A. These bonds are secured by—primarily secured by revenues of half-cent sales tax and guaranteed entitlement. That is the way the issue has been structured, so that it stands alone and independent from any losses or gains of the system.
(*Id.* at 108).

* * *

Q. At this point, and that is today, are you satisfied that a city-owned CATV system is economically and technically feasible in Niceville?

(Pause for counsel to confer with witness)

A. Like I've said before, the bond issue has been structured to be paid off from funds other than the cable system, and in that regard we are satisfied that these bonds can be paid off regardless of other revenues that may or may not be received.

Q. And regardless of whether it's even technically feasible?

A. The bonds—yes, we're convinced that we will complete the structuring of a financing that will be paid off. We are comfortable with that assumption. That does not mean that we're not concerned with the financial feasibility of the cable system.
(*Id.* 134-35)

TESTIMONY OF GERHARD J. HANNEMAN
EXPERT WITNESS FOR NICEVILLE

Q. What sort of resources do they [Niceville] have?

A. They're a city. They've got trucks, and they've got staff and a billing system, which a traditional, from a traditional overbuild, where a start up has none of that. Do they wish to cross-subsidize from other departments and other resources, and they're willing to sustain losses to this level, if this is significant, yeah, it's not; then it's okay.

To the degree that they're not willing to cross-subsidize and sustain it, I question the feasibility in some of these scenarios.

Q. Would you think that without cross-subsidization that this is feasible?

A. Without subsidization in the early years, this system will run a deficit. I say, again, I don't know if that's feasible to the City of Niceville or not.
(Jan. 25, 1988; Dep. Tr. 21)

* * *

Q. Twenty-five per seven manual basis?

A. That's the initial cost to get a new sub. and then for maintenance, plus the high level of churn that I believe to be the case in Niceville, it will be a higher number than 1200 a year by triple, quadruple, at least. It would be about $2 a customer per year.

Q. Two dollars per customer per year?

A. Yeah, minimum. That would be about four or $5,000 assuming that Niceville hits 2,000 subs ultimately. I would believe that that number is too low in the early years. I qualify that again. The City of Niceville, again, has access to

resources that independent operators wouldn't. That is, they have regular communication through all citizens of the community through water bills and so forth.

Q. Would that give Niceville an advantage in marketing; do you think?

A. Yes, I do.

(January 25, 1988; Dep. Tr. 24).

* * *

Q. If we could pause there for a second. Could they service the debt?

A. There are many, many issues related to making sense and overbuilt feasibility, but in this particular issue, we were asked to focus on the financial aspect related to the bond issue.

Q. Did you form an opinion on whether they could service their debt?

A. I did.

Q. What is your opinion?

A. It's shaky.

(*Id.* 27)

* * *

Q. I had asked you earlier about the technical aspects, and let me see if I can separate, and if your opinion would be the same as it would deal with the technical feasibility of the system. Do you agree that the technical feasibilities as contained in this study, that the city can accomplish a goal of constructing a competitive cable communication system?

A. Well, the world has changed quite a bit with the cable act which must carry on and off again with telephone return for security instead of two-way plan, so I will say that for 1985, if your question relates to the integrity of the design, it's a 1985 design, that would be fine. Would the cable industry do this in 1987, no, they wouldn't. It's overkill.

Q. Overkill in what aspect?

A. The 550 for one. Power costs and other maintenance problems. The two-way capability is overkill nowadays in terms of current thinking.

Q. How do you mean that that two-way system is an overkill?

A. Because the converter manufacturers and the pay-per-view providers have all made some arrangement of telephone return, either directly with a line plugged into the converter or through automatic identification systems through AT&T. That will negate the need for two-way plant. Two-way plant has come to be very, very expensive to maintain in a salt air environment. It's something the industry doesn't do much any more. But when this was written, they were still valid assumptions.
(*Id.* 79-81)

AFFIDAVIT OF EDWARD T. RUTTER
EXPERT WITNESS FOR WARNER, JULY 23, 1987

2. In my capacity as a consultant to the cable television industry I have frequently dealt with the subject of economic feasibility of a specific cable television venture, the appropriate rates charged for service, the impact of regulation and competition, and the need to provide a service package which will meet the demands and needs of the particular area in question. . . .

* * *

6. . . . Cable television, like traditional public utilities, is capital intensive which requires that large amounts of capital must be expended and cable plant put into place before any subscribers are connected. Because of this "capital intensive" characteristic, which requires that competition must duplicate the existing plant in kind, the diseconomies of direct competition are so burdensome that competition will not persist if only because it would lead to the bankruptcy of one of the operators. But even if competition were to persist, it is wasteful of resources because it involves wasteful duplication of cable, headends, towers, etc.

* * *

9. In my capacity as consultant to Warner Cable Communications, Inc., I have reviewed the City of Niceville, Flor-

ida's proposal . . . I discovered that in order to compete head-on with Warner in Niceville, the City must duplicate a cable television system that now serves approximately 82% of the existing households. Warner's existing cable television system provides a wide variety of service and capability similar to what the cable industry and its subscribers have adopted as state-of-the-art . . . Therefore, the City realistically cannot provide any service or capability that is not already in place in the existing system without subsidizing the cable operations, since historically cable subscribers themselves have not economically supported those "futuristic" services.

* * *

17. It is clear from my examination that the intent of the City is to drive Warner from the marketplace in order to then satisfy the public need that is now created by Warner's withdrawal, and thereby deprive Warner the opportunity to achieve a fair and reasonable return on its investment.

* * *

19. Based on the information available to us, and as contained in the City's financial statement, the Valparaiso cable communications system [a nearby municipally-owned cable system] is not self-supporting. In my opinion, when one considers that cable television is not an essential service and not every household is a subscriber, it would appear to be contradictory to the overall general public interest to have the communications system subsidized or funded from other than user charges.

TESTIMONY OF HARRY F. SHERAW
WARNER'S LOCAL MANAGER

Q. How many cable television systems provided by a private operator to residential subscribers offer bi-directional services of a fire, police, and health-protection nature?

A. I really have no idea how many in the United States.

Q. I'm not asking the number. I understand you don't know the number. I'm saying does anyone, to your knowledge?

A. In general I would say that it's a small portion of the 5,000-plus cable operators.

* * *

Q. Why hasn't it become more widely utilized?

A My general understanding is for two reasons: number one, that it is not an area that has proved to be break-even or profitable; and number two, there are alternative means to attain those services.

Warner held a subsidiary that was our security systems. We ultimately sold that out to Rollins who is a specialist in the burglary/fire protection services. We decided that it was an area that was best left to those people who were in that business.

Q. That is essentially, would you say, the reason why Warner has not considered bi-directional capability in its franchising in the Fort Walton area?

A. Correct, it is generally—it is an economic decision that we have not seen neither the customer request for, nor the need to put that additional investment in there to have it subsidized through the basic entertainment features.

Q. Now, when you were briefed about the political "lay of the land," if you will, around the time that you made the move in April, 1985, to Fort Walton, did you then come to understand that there was some interest in Niceville—at least in the residents of Niceville for that kind of service?

A. No, I don't recall that coming up as a conversation topic.

Q. That was never communicated to Warner, either through a newspaper article or in direct conversation, or in complaints or correspondence with subscribers?

A. It could have been conveyed to Warner. If it was conveyed to Warner or conveyed to the people who talked to me the day before I came down here, then they did not pass that information on to me.

Q. Did you learn about it later, after you relocated?

A. Yes. I might expand upon that. I learned subsequent or later to coming down here that the city was interested in that. I have not had customers personally request the services of me.

Q. Warner presently doesn't have the ability to service such a request, does it?

A. We do, in fact, have the capability for bidirectional. We do not have reverse amplifier modules, but the capability exists.

Q. You're saying that the new cable that has been run as part of the rebuild has the technical capacity to permit a bi-directional system is not in place or purchased?

A. That is correct.

(Oct. 13, 1986; Dep. Tr. 91-95).

TESTIMONY OF TERRY TISLOW
MEMBER OF CITY COUNCIL OF NICEVILLE

Q. And what way did you understand that a cable TV system would control traffic lights?

A. Well, as I understand it, it would be—that it would control the timing of the lights, and if one of them was messed up, then it would also indicate that.

Q. Do you know whether or not the City has any traffic control of the traffic lights today?

A. Well, what do you mean by the City having control? We have a person that can change the timing on them, that sort of thing, if that's what you mean by control of them.

(Oct. 15, 1986; Dep. Tr. 59)

* * *

Q. Have you had any discussions with Mr. Corbin about whether a timing system [for traffic lights] as controlled either by a cable system or any other system would in fact benefit the City?

A. I don't really think we know that—the answer to that. That's—in fact, just last night it was discussed that maybe a professional consultant coming in for the traffic problems here. I don't really believe anyone around here is qualified in

traffic control. I know I'm not. Of course, I believe in just shooting them through as fast as you can get them through, and then bringing them back home that night.

No—to answer your question—I don't believe anyone's qualified.

(*Id.* 60)

TESTIMONY OF WILLIAM JORDAN
MEMBER OF CITY COUNCIL OF NICEVILLE

Q. And have you made any comparison as to the economics of the system [alarm services] the City currently uses as it would deal with one operated through a TV cable line?

A. No, sir, I haven't made any comparison.

Q. To your knowledge, has anyone in the City made such a comparison, or such a study?

A. Not to my knowledge.

(Nov. 7, 1986; Dep. Tr. 35)

TESTIMONY OF WILLIAM W. McABEE
AUDITOR OF CITY OF VALPARAISO CABLE SYSTEM

Q. Then, for instance, if at a period of time the City [of Valparaiso, nearby to Niceville] went into the Vesper III system, the security system, and that cost "X" number of dollars, and the income was not adequate to recapture that, and the City wanted not to recollect [collect] that, that would be handled as a contribution from a municipality?

A. Yes.

Q. Now, are you familiar with whether that in fact has happened?

A. That might have been—if in fact it did happen—and vaguely I do remember something—but it probably was in the mind of the City Commission or the County—City Commission in this particular case—to make a determination not to recollect [collect] the money from the—or terminate collecting the money from the communication fund.

Q. As it shows between the 1984 and 1985 audit, do you have—is that—you know, to the best of your knowledge, is that the difference of the $202,000?

A. What page are you on?

Q. Exhibit D-1 of the 1985 audit.

A. That's probably the amount that was forgiven—net amount. So I gave you an incorrect answer at the time you asked me, because I really didn't know they had done this. I wasn't trying to mislead you.

(Sept. 2, 1986; Dep. Tr. 48-49)